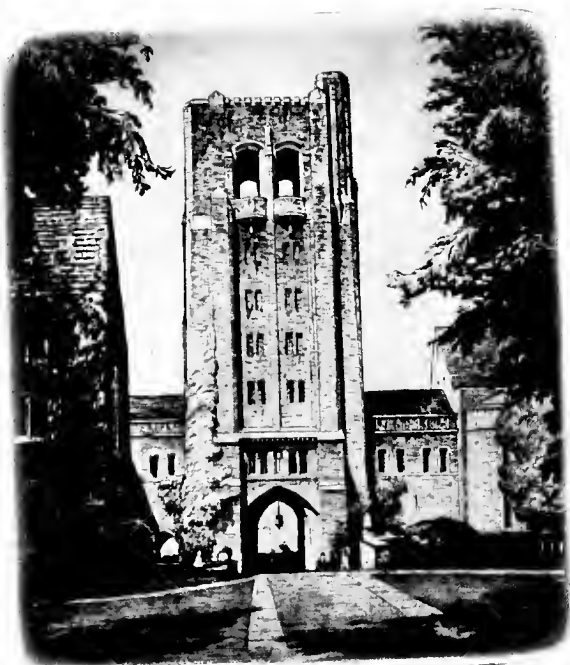


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FOR
BUSINESS CORPORATIONS

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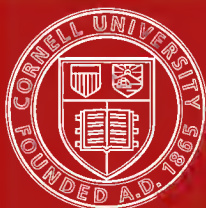
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WHITE'S MANUAL

FOR

BUSINESS CORPORATIONS

CONTAINING

The Statutes and Procedure relative to the Organization and Management of Business Corporations in the State of New York; the Powers, Duties and Liabilities of the Directors and Stockholders thereof; the Provisions respecting the Transaction of Business in said State by Foreign Corporations, etc.

WITH

INSTRUCTIONS, DECISIONS AND FORMS

BY

HON. FRANK WHITE

Lecturer on Corporations at the Albany Law School; Former Deputy Attorney-General of the State of New York; Author of "White on Corporations;" Co-Editor of "Dill on New Jersey Corporations," etc.

EIGHTH EDITION

Re-written and Revised to January 1, 1912

NEW YORK AND ROCHESTER, N. Y.
THE LAWYERS' CO-OPERATIVE PUBLISHING CO.
1912

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PREFACE TO EIGHTH EDITION

The seventh edition of this book was published more than five years ago, and for some time has been out of print. During the intervening period the corporation laws have been amended in many important respects, interpretations of various provisions have come from the courts, and in addition the Consolidated Laws of 1909 have been enacted. In the consolidation of the corporation laws the consolidators deemed it necessary to re-write, rearrange and transpose many sections. Various provisions from the Code of Civil Procedure have been added to the General Corporation Law because they related generally to corporations; however, most of this matter relates to actions and court procedure.

The popularity of the corporation laws of the State of New York is amply attested by the great increase in the number of corporations organized under the statutes of this state. Prior to 1901 less than nineteen hundred new companies were incorporated each year within the state. After the liberalization of the corporate laws in that year the number increased by leaps and bounds. For several years past more than eight thousand new corporations have been formed annually under New York laws.

FRANK WHITE.

32 Liberty Street,
New York City,
January 15, 1912.

PREFACE TO SEVENTH EDITION

The necessity for a convenient hand-book embodying a complete and practical compilation of the laws of the State of New York concerning the organization, powers, management, assessment and taxation of business corporations; the election, duties, and liabilities of directors and officers; the rights and liabilities of stockholders, and the many other important matters affecting such corporations, has induced the author to place this volume before the public. He has endeavored to arrange the book in such a manner as to make it a desirable acquisition to the library of the lawyer for use in connection with the class of corporations of which it treats, and, at the same time, to render it a serviceable agency in assisting officers and directors in the performance of the statutory duties devolving upon them in their relations with corporate enterprises.

It is not contemplated, however, that this book shall trespass upon the domain of or compete with "White on Corporations," a work of twelve hundred pages (now 1,500 pages), containing a complete exposition of the statutes and decisions relative to all stock corporations, other than banking and insurance companies. This manual has a mission entirely separate and distinct from the larger book, and the author hopes it may merit the same generous treatment accorded the earlier editions.

The enactment of the amendatory legislation of 1901, remodeling and liberalizing our corporation laws, has served to bring these statutes into harmony with the most modern and advanced corporate methods. The effect of these modifications, whereby, among other things, proper and necessary safeguards have been adopted in behalf of corporate interests, has been quickly felt in attracting to the State incorporated capital from all parts of the country.

The author of this book takes what he hopes may be deemed pardonable pride in the fact that he was accorded the privilege of being associated with several other lawyers in accomplishing the very desirable results achieved, and in thus popularizing the State of New York as a domicile for important corporations. He also prepared and advocated in legislative committees during the session of 1904 several bills which were passed for the further simplification of the corporation statutes, and which are contained in this volume.

FRANK WHITE.

32 Liberty Street,
New York City,
January 2, 1905.

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BUSINESS CORPORATIONS LAW

Laws of 1909, Chapter 12, Entitled: "An Act Relating to Business Corporations, Constituting Chapter Four of the Consolidated Laws," as Amended to the Commencement of the Legislative Session of 1912.

CHAPTER 4 OF THE CONSOLIDATED LAWS

*Business Corporations Law

- Article 1. Short title (§ 1).
2. General provisions (§§ 2-16).
3. Laws repealed; when to take effect (§§ 25, 26).

ARTICLE 1

Short Title

Section 1. Short title.

§ 1. **Short title.** This chapter shall be known as the "Business Corporations Law."

Former § 1, ch. 567, L. 1890, as am'd by L. 1892, ch. 691, and L. 1895, ch. 671.

In addition to the provisions of this law, which are applicable only to business corporations, other provisions regulating the affairs of such corporations are contained in the General Corporation Law and the Stock Corporation Law. See, also, the comments on pages 58 and 208, respectively. If there should be any provision in this law in conflict with any provisions of the General Corporation Law or of the Stock Corporation Law, the provisions of this law so conflicting shall prevail and the provision of the other law with which it conflicts shall not apply in such case. Gen. Corp. Law, § 321.

*This law was passed February 17, 1909, and took effect immediately. It supersedes and repeals the Business Corporations Law of 1890 (ch. 567), which took effect May 1, 1891, and which was revised and entirely re-enacted by the Laws of 1892, ch. 691.

ARTICLE 2

General Provisions

Section 2. Incorporation.

- 2-a. Incorporating for the purpose of conducting law business, et cetera, prohibited.
3. Restrictions upon commencement of business.
4. Reorganization of existing corporations.
5. Payment of capital stock.
6. Full liability corporations.
7. Consolidation of corporations.
8. Submission of consolidation agreement to stockholders.
9. Powers of consolidated corporations.
10. Transfer of property of old corporations to consolidated corporations.
11. Rights of creditors of old corporations.
12. District steam corporations.
13. Examination of meters by agent of district steam corporations.
14. Entry by agent of district steam corporations to cut off steam.
15. Water companies.
16. Improvement corporations; right of condemnation.

§ 2. Incorporation. Except as provided in section two-a of this chapter, three or more persons may become a stock corporation for any lawful business purpose or purposes other than a moneyed corporation, or a corporation provided for by the banking, the insurance, the railroad and the transportation corporations laws, or an educational institution or corporation which may be incorporated as provided in the education law, by making, signing, acknowledging and filing a certificate which shall contain:

1. The name of the proposed corporation.
2. The purpose or purposes for which it is to be formed.
3. The amount of the capital stock, and if any portion be preferred stock, the preferences thereof.
4. The number of shares of which the capital stock shall consist, each of which shall not be less than five nor

more than one hundred dollars, and the amount of capital not less than five hundred dollars, with which said corporation will begin business.

5. The city, village or town in which its principal business office is to be located. If it is to be located in the city of New York, the borough therein in which it is to be located.

6. Its duration.

7. The number of its directors, not less than three.

8. The names and post-office addresses of the directors for the first year.

9. The names and post-office addresses of the subscribers to the certificate, and a statement of the number of shares of stock which each agrees to take in the corporation.

Any certificate of incorporation filed, prior to April twenty-second, eighteen hundred and ninety-six, under the provisions of the business corporations law theretofore in force which shall contain the names and post-office addresses, either of the subscribers to the stock of the subscribers to the certificate, and a statement of the number of shares of stock which each agrees to take in the corporation, shall be deemed to have complied with the requirements of section two, subdivision nine of said law.

If meetings of the board of directors are to be held only within the state the certificate or by-laws must so provide.

L. 1909, ch. 12, § 2, as am'd by L. 1909, ch. 484.

Formerly § 2, L. 1890, ch. 567, as am'd by L. 1892, ch. 691; L. 1895, ch. 671; L. 1896, ch. 396; L. 1896, ch. 460; L. 1901, ch. 520; L. 1903, ch. 525; L. 1904, ch. 446; L. 1907, ch. 646.

For forms of certificates of incorporation under this law, see post, Forms Nos. 1 and 14.

For example of classification of preferred and common stock, etc., see post, Form No. 2.

The words "Except as provided in section two-a of this chapter," in the first paragraph of this section, were inserted by L. 1909, ch. 484. For section two-a see page 11.

Provisions inserted in this section in 1903, permitting a corporation to insert in its certificate of incorporation any limitation upon its powers, and upon the powers of its directors and stockholders, which does not exempt them from obligations and duties imposed by law, were omitted by L. 1909, ch. 12, because duplicate provisions were contained in Gen. Corp. L. § 10.

Incorporators.

There must be at least three incorporators, all of full age; at least two-thirds of them must be citizens of the United States, and at least one of them a resident of the State of New York. Gen. Corp. Law, § 4. Only natural persons can become incorporators. *Id.* Corporations, copartnerships and persons acting in a representative capacity, are, therefore, excluded from acting as incorporators; however, after the formation of the corporation, copartnerships may become stockholders, as may executors, administrators, guardians or trustees. Stock Corp. Law, § 58. And other stock corporations, both domestic and foreign. Stock Corp. Law, § 52.

Corporate Name.

The corporate name must be in the English language and must not conflict with that of any other domestic corporation, or of any foreign corporation authorized to do business in this State, and it must not contain the word trust, bank, banking, insurance, assurance, indemnity, guarantee, guaranty, title, savings, investment, loan or benefit. In selecting a corporate title, if desired, an individual name, or the name of a copartnership, to whose business the new corporation succeeds, may be used, but in such case there must also be used some word to indicate that it is a corporation. Gen. Corp. Law, § 6. At any time after incorporation the name may be changed by act of the Legislature, or by a special proceeding in the Supreme Court. Gen. Corp. Law, §§ 60-65. The word limited should not be used as part of the corporate name. It can serve no good purpose, and would be misleading by creating an impression that the corporation had been organized under ch. 611, L. 1875, which was repealed in 1890. See comments under "Liability of Stockholders," page 9.

Objects.

A stock corporation may be formed under this law to carry on any one or more kinds of business that may be lawfully conducted by an individual, except as limited in the first paragraph of section 2, and by section 2-a. If found desirable, after organization, the purposes, powers or provisions set forth in the certificate of incorporation may be altered or extended by an amended certificate. Stock Corp. Law, § 18. The only classes of stock corporations that are excluded from organization under the provisions of the Business Corporations Law are such as are provided for by other corporate laws, to wit: Railroad corporations, which must be formed under the Rail-

road Law; ferry, navigation, stage coach, tramway, pipe-line, gas and electric light, water works, telegraph and telephone, turnpike, plank-road and bridge corporations, all of which must be formed under the Transportation Corporations Law; banks, savings banks, trust companies, building and mutual loan corporations, co-operative loan associations, mortgage, loan and investment corporations, safe deposit companies and certain associations for loaning money on personal property, all of which may be incorporated under the Banking Law; insurance companies, which are provided for in the Insurance Law; educational institutions, which may be incorporated as provided in the Education Law. Although corporations for the purpose of producing and selling artificial gas must be organized under the Transportation Corporations Law, yet a company for the purpose of boring natural gas wells and piping and delivering the gas to consumers for hire may properly incorporate under the Business Corporations Law. *Wilson v. Tennent*, 32 Misc. 273, affd., 61 App. Div. 100, affd., 179 N. Y. 546. Notwithstanding the provisions in the Transportation Corporations Law for the organization of water works corporations thereunder, certain water companies are permitted to incorporate under this law. See notes under section 15 of this law.

If a certificate of incorporation contains provisions repugnant to the statute the Secretary of State is not required to file it. *Peo. ex rel. Barney v. Whalen*, 104 N. Y. Supp. 555, 119 App. Div. 749, affd., 189 N. Y. 560; *Peo. ex rel. Blossom v. Nelson*, 46 N. Y. 477.

Capital Stock.

The amount of the capital stock must be definitely stated, and if any portion is to be preferred stock the amount thereof and the nature of the preferences must be set forth. Corporations are permitted to issue both preferred and common stock, and different classes of preferred stock, if the certificate of incorporation so provides, or to make preferred issues after incorporation. Stock Corp. Law, § 61. No limitations as to the amount of capital stock are prescribed, except that it shall not be less than \$500; for it is to be noted, that the certificate of incorporation must state the amount of capital (but not less than \$500), with which the corporation will begin business, and the amount so stated must be paid in money or property before the corporation is permitted to incur debts. See § 3, post.

One-half of the capital stock is required to be paid in within one year. See § 5, post, and notes thereunder. But failure to pay in half the capital stock within the statutory time merely creates a liability for a forfeiture of corporate rights. Proceedings must be taken to accomplish an actual dissolution. *Peo. v. Buffalo Stone & Cement Co.*, 131 N. Y. 140.

The amount of capital stock may be increased or reduced after incorporation. Stock Corp. Law, §§ 62, 63 and 64.

Stock may be issued for money, services or property, and when issued for property "in the absence of fraud in the transaction the judgment of the directors as to the value of the

property purchased shall be conclusive." Stock Corp. Law, § 55. The certificate of incorporation may provide for partly paid stock. Stock Corp. Law, § 60.

The certificate of incorporation may classify the stock into common and preferred, and may provide that the preferred stockholders shall be deprived of voting power, upon questions relating to the management, in consideration of the preferences over the common stock which is given them. *Peo. ex rel. Browne v. Koenig*, 133 App. Div. 756.

Shares of Stock and Transfers Thereof.

The par value of the shares of stock must not be less than \$5 nor more than \$100 each. The par value of the shares may be increased or reduced after incorporation, without changing the amount of the capital stock. See Stock Corp. L., § 65.

The stock is represented by certificates prepared by the directors and signed by the president or vice-president and by the secretary or treasurer, and sealed with the corporate seal. Stock Corp. L., § 50. The legal title to shares may be transferred by delivery of the certificate of stock with a blank power of attorney indorsed thereon signed by the owner of the shares named in such certificate. *Knox v. Eden Musee Am. Co.*, 148 N. Y. 441; *McNeil v. Tenth Nat'l Bk.*, 46 N. Y. 325.

A stamp tax of two cents on each \$100 of face value or fraction thereof must be paid on all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any domestic or foreign association, company or corporation. Tax Law, § 270. There is no stamp tax on the original issue of the shares of stock by the corporation and the delivery thereof to its stockholders. *Peo. v. Duffy-McInnerney Co.*, 122 App. Div. 336, *affd.*, 193 N. Y. 636.

The law taxing shares under \$100 face value at the rate of two cents per share was declared unconstitutional. *Peo. ex rel. Farrington v. Mensching*, 187 N. Y. 8, *affg.* 115 App. Div. 893.

Principal Office.

The name of the city, village or town in which the principal office of the corporation is to be located must be stated in the certificate, and if in the city of New York the name of the borough must be stated. The street and number are not required to be given. The location may be changed at any time. Stock Corp. Law, § 13. Under the definition in section 3 of the General Corporation Law the terms "principal office" and "principal place of business" are synonymous. *Peo. ex rel. Knickerbocker Press v. Barker*, 87 Hun 341, *affd.*, 147 N. Y. 715. The location of the principal office in the certificate of incorporation is, as against the corporation, conclusive evidence of its residence, unless it has been legally changed. *Peo. ex rel. Knickerbocker Press v. Barker*, 87 Hun 341, *affd.*, 147 N. Y. 715; *Peo. ex rel. Edison Electric Light Co. v. Barker*, 91 Hun 594.

The designation, in the certificate of incorporation, of the location of the principal office is conclusive as to the taxation

of the personal property of a corporation. *Union Steamboat Co. v. Buffalo*, 82 N. Y. 351; *Western Transp. Co. v. Scheu*, 19 N. Y. 408; *Oswego Starch Factory v. Dolloway*, 21 N. Y. 449.

Duration.

The period of existence must be stated, but there is no limitation as to the length of the term, and it may be perpetual if the certificate so states. Corporate existence fixed for a term of years may be extended at any time before the expiration thereof, and, in certain cases, may be revived after its expiration. *Gen. Corp. L.*, §§ 37-40. The corporate life begins at the time of filing the certificate of incorporation. If the term of existence is limited and it is desired that the consent of stockholders owning a greater percentage than two-thirds of the capital stock shall be requisite to effect an extension the certificate may so provide. *Gen. Corp. L.*, § 37.

Directors.

The minimum number of directors is three, but the maximum limitation of thirteen existing prior thereto was eliminated by Laws of 1901, chapter 520. At least one director must be a resident of the State. *Gen. Corp. L.*, § 34. Each director is to be a stockholder unless otherwise provided in the certificate, or in a by-law adopted at a stockholders' meeting. *Stock Corp. L.*, § 25. The board of directors may be classified so that only one-fourth of the number need to be elected annually, thereby preventing any sudden change of management. *Stock Corp. L.*, § 25. Vacancies in the board are to be filled in the manner prescribed in the by-laws. *Stock Corp. L.*, § 25. In case of failure to elect directors at the time fixed for the annual meeting of stockholders, directors continue to hold office until their successors have been elected. *Gen. Corp. L.*, § 28. If desirable, after incorporation, the number of directors may be changed. *Stock Corp. L.*, § 26. The certificate may provide for cumulative voting at elections of directors. *Gen. Corp. L.*, § 24. Any limitation upon the powers of directors may be inserted in the certificate which does not exempt them from obligations or duties imposed by law. *Gen. Corp. L.*, § 10. If meetings of directors are to be held only within the State the certificate or by-laws must so provide. *Bus. Corp. L.*, § 2. The subscribers to the certificate of incorporation may be named as directors for the first year; however, it is not necessary that the persons so named as directors be incorporators. The original directors named in the certificate of incorporation become such by direct command of the statute, and not through an election by stockholders; therefore, after the filing of the certificate, they have full power to act as directors and authority to make any contract in behalf of the corporation that it is capable of making. The corporate authority of such an organization must, from necessity, be coincident with the inception of its corporate existence, and ante-dates acquisition by it of property or the issue of stock certificates. *Hamilton*

Trust Co. v. Clemes, 163 N. Y. 423; McDowall v. Sheehan, 129 N. Y. 207; Davidson v. Westchester Gas Lt. Co., 99 N. Y. 558.

A clause in a certificate of incorporation which provides that the number of directors shall not be changed except by the unanimous consent of all the stockholders is a valid and binding limitation upon the powers of the stockholders and authorized by section 10 of the General Corporation Law. Ripin v. U. S. Woven Label Co., 71 Misc. 510.

The board of directors may appoint an executive committee of their own number to transact the corporate business during the intervals between the meetings of the board. Sheridan Elec. Lt. Co. v. Chatham Nat. Bk., 127 N. Y. 517; Olcott v. Tioga R. R. Co., 27 N. Y. 546; First Nat. Bk. v. Com'l Travelers' Home Assn., 108 App. Div. 78, *affd.*, 185 N. Y. 575.

Subscribers to the Certificate.

The names and post-office addresses of the subscribers to the certificate are required to be set forth, and a definite statement of the number of shares of stock each agrees to take in the corporation. There is no provision requiring any fixed proportion of the stock to be subscribed for at the time of forming the corporation, but the certificate must state the amount of the capital, not less than \$500, with which the corporation will begin business. Bus. Corp. L., § 2, subd. 4.

The relation of shareholder in a corporation is created by the subscription agreement, and it is not essential to such relation that a certificate of stock be actually issued. Beals v. Buf. Expanded Metal Const. Co., 49 App. Div. 589.

A certificate of incorporation, which is signed by the only stockholders, and which specifies the number of shares each agrees to take, constitutes a legal liability on the part of each to pay the corporation for the number of shares specified. Rathbone v. Ayer, 121 App. Div. 355.

Additional Provisions and Powers.

The certificate of incorporation may authorize the company to acquire, hold and dispose of the stocks, bonds and other obligations of any other corporations, domestic or foreign, with power to issue in exchange its own securities therefor. Stock Corp. L., § 52. The right to issue preferred stock of one or more classes may be provided for. Stock Corp. L., § 61. Provisions may be inserted for the issue of partly paid stock. Stock Corp. L., § 60. The certificate may provide for cumulative voting at elections of directors. Gen. Corp. L., § 24. A provision to the effect that directors are not required to be stockholders may be inserted. Stock Corp. L., § 25. A corporation may insert in its certificate of incorporation any limitation upon its powers, and upon the powers of its directors and stockholders which does not exempt them from obligations and duties imposed by law. Gen. Corp. Law, § 10.

The certificate may not contain provisions repugnant to the statute, and a provision that the directors may, with the con-

sent of two-thirds of the stock, sell or otherwise dispose of the entire property of the corporation except its franchises to any person or corporation, domestic or foreign, was properly rejected by the Secretary of State as contrary to section 33 (now 16) of the Stock Corp. Law. *Peo. ex rel. Barney v. Whalen*, 119 App. Div. 749, *affd.*, 189 N. Y. 560; *Same v. Same*, 56 Misc. 278.

Liability of Stockholders.

The liability of a stockholder is limited to the payment of the amount remaining unpaid upon his stock. Stock Corp. L., § 56. Such corporations constitute what were formerly termed "limited liability companies," without making a statement to that effect in the certificate, and without using the word "limited" as a part of the corporate title. A full liability corporation may be formed under this law only by stating affirmatively that it is to be such. See section 6 of this law. Stock issued for property necessary for the corporation is full-paid, and in the absence of fraud in the transaction, the judgment of the directors as to the value of the property purchased is conclusive. Stock Corp. L., § 55.

Acknowledgment.

An incorporator has no power, in his capacity as notary public, to take the acknowledgment of another incorporator to the certificate of incorporation, and an acknowledgment so taken is a nullity. *Peo. ex rel. Erie R. R. Co. v. Bd. of R. R. Comrs.*, 105 App. Div. 273.

The acknowledgment may be taken before any officer authorized to take the acknowledgment or proof of the execution of a deed of real property to entitle it to be recorded in a county clerk's office, and shall be made and certified in the same manner as such acknowledgment or proof of such deed. Gen. Construction L., § 11.

The Secretary of State does not require a county clerk's certificate authenticating the act of a notary public or other officer taking an acknowledgment within the State of the execution of a corporation certificate to be filed in his office, but, where an acknowledgment is taken in one county and the duplicate original certificate is to be filed in the office of the clerk of another county, there should be a certificate of the clerk of the county in which the acknowledgment is taken authenticating the act of the officer taking such acknowledgment. Real Prop. L., § 310.

Filing and Recording.

The certificate of incorporation must be filed and recorded in the office of the Secretary of State, and a copy duly certified by the Secretary of State, or a duplicate original, must be filed and recorded in the office of the clerk of the county in which the office of the corporation is to be located. Gen. Corp. Law,

§ 5. If, instead of a certified copy, a duplicate original certificate is to be filed and recorded in a county other than the one where it is executed, the county clerk's certificate should be attached, authenticating the act of the notary, justice of the peace or commissioner of deeds taking the acknowledgment. The Secretary of State does not require such county clerk's certificate as to an acknowledgment taken within the State before a person duly authorized to take the same, but an acknowledgment or affidavit taken by a notary public in another State must be properly authenticated. If an acknowledgment or affidavit is taken out of the State by a commissioner of deeds for the State of New York appointed to act in such State, no authentication by a court clerk, or other official, is required.

Fees and Organization Tax.

The fees in the office of the Secretary of State are: Filing, \$10; recording, fifteen cents a folio; fees in the county clerk's office: Filing, six cents; recording, ten cents per folio. In addition, an organization tax of one-twentieth of one per cent. upon the capital stock must be paid to the State Treasurer before the certificates can be filed. For text of the statutes regulating payments, and information relative to remittances, see pages 31-45. This tax is fifty cents on each \$1,000 of capital stock.

Directors' Meetings.

The holding of directors' meetings without the State is impliedly authorized by the provision inserted in section 2 of this law by an amendment of 1904, ch. 446, as follows: "If meetings of the board of directors are to be held only within the State the certificate or by-laws must so provide." This amendment was enacted so as to supersede an opinion of the Attorney-General which was based upon the decision in *Ormsby v. Vermont Copper Mining Co.*, 56 N. Y. 623.

Correction of Informalities.

In case of any informality in the certificate of incorporation, or in a supplemental certificate, the same may be corrected by an amended certificate. Gen. Corp. Law, § 7.

Repeal of Charter.

The charter of every corporation is subject to alteration, suspension and repeal, in the discretion of the Legislature. Gen. Corp. Law, § 320. The repeal of a charter does not, however, destroy vested property rights. *Peo. v. O'Brien*, 111 N. Y. 1.

Defective Certificate.

Defects or informalities in the certificate of incorporation may be corrected by filing an amended certificate as provided by statute. Gen. Corp. Law, § 7.

By-Laws.

By-laws are the permanent rules for the regulation of the corporate affairs, ranking next to the charter in authority, importance and permanence. For statutory provisions as to what may be regulated by by-law, see Gen. Corp. Law, § 11, subd. 11.

By-laws must be reasonable and adapted to the purposes of the corporation. If not, they are void. *Peo. v. Medical Society of Erie*, 24 Barb. 570; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159.

By-laws are effective as to third persons only when they have knowledge of their provisions. *Oakes v. Cattaraugus Water Co.*, 143 N. Y. 430.

Subscriptions to Stock.

The statement in a certificate of incorporation of the number of shares which the incorporators agree to take constitutes a valid subscription. *Rathbone v. Ayer*, 121 App. Div. 355.

Where defendants subscribe for stock in a corporation to be thereafter organized, it was not essential that the corporation should be organized by the parties to the agreement or their representatives. *Avon Spring Sanitarium Co. v. Weed*, 119 App. Div. 560. A subscription for stock in a corporation before it was formed may be enforced by it after coming into existence. *Id.*

For other cases respecting subscriptions for stock, see Stock Corp. Law, §§ 51 and 53.

A subscription to the certificate of incorporation, with a statement of the number of shares opposite the name, is a binding subscription and takes effect upon the filing of the certificate. *Phoenix W. Co. v. Badger*, 67 N. Y. 294; *Powers v. Knapp*, 71 Hun 371.

The payment of ten per cent. when the agreement to incorporate is made is not essential to its validity, as such payment is required only of those who subscribe after the organization of the corporation. *Yonkers Gazette Co. v. Taylor*, 30 App. Div. 334. And by the terms of section 53 of the Stock Corporation Law, it is only the subscribers whose subscriptions are payable in money who are required to pay ten per cent. in cash.

§ 2-a. Incorporating for the purpose of conducting law business, et cetera, prohibited. No corporation shall be organized or created under the provisions of this chapter for the purpose or purposes of conducting any branch of the practice of law or of retaining or employing an attorney or attorneys to furnish legal advice, draw legal papers or perform legal services of any kind or descrip-

tion, either directly for the person, persons or corporation for whose use such services are rendered, or for the corporation retaining such attorney in compliance with any contract of employment of the corporation or of the attorney made by the corporation with any other person, persons or corporation. The statement of the purpose or purposes of a corporation, in any certificate filed under the provisions of this chapter, in whatsoever language the same may be set forth, shall not be held or construed to confer on the corporation the power to transact any business specified in this section as a purpose for which the creation of a corporation under this chapter is prohibited; and particularly when the stated objects of a corporation include the collection of debts or accounts, in words or substance, they shall not be construed to include the employment or furnishing of attorneys to prosecute any action or pursue any legal or equitable remedy in aid of such collections.

New; added by L. 1909, ch. 484.

Penal Law Provision.

In addition to the foregoing the Penal Law, § 280, added by ch. 483, L. 1909, to take effect Sept. 1, 1909, provides as follows:

§ 280. **Corporations and voluntary associations not to practice law.**—It shall be unlawful for any corporation or voluntary association to practice or appear as an attorney-at-law for any person other than itself in any court in this state or before any judicial body, or to make it a business to practice as an attorney-at-law, for any person other than itself, in any of said courts or to hold itself out to the public as being entitled to practice law, or to render or furnish legal services or advice, or to furnish attorneys or counsel or to render legal services of any kind in actions or proceedings of any nature or in any other way or manner, or in any other manner to assume to be entitled to practice law or to assume, use or advertise the title of lawyer or attorney, attorney-at-law, or equivalent terms in any language in such manner as to convey the impression that it is entitled to practice law, or to furnish legal advice, services or counsel, or to advertise that either alone or together with or by or through any person whether a duly and regularly admitted attorney-at-law, or not, it has, owns, conducts or maintains a law office or an office for the practice of law, or for furnish-

ing legal advice, services or counsel. It shall be unlawful further for any corporation or voluntary association to solicit itself or by or through its officers, agents or employees any claim or demand for the purpose of bringing an action thereon or of representing as attorney-at-law, or for furnishing legal advice, services or counsel to a person sued or about to be sued in any action or proceeding or against whom an action or proceeding has been or is about to be brought, or who may be affected by any action or proceeding which has been or may be instituted in any court or before any judicial body, or for the purpose of so representing any person in the pursuit of any civil remedy. Any corporation or voluntary association violating the provisions of this section shall be liable to a fine of not more than five thousand dollars and every officer, trustee, director, agent or employee of such corporation or voluntary association who directly or indirectly engages in any of the acts herein prohibited or assists such corporation or voluntary association to do such prohibited acts is guilty of a misdemeanor. The fact that such officer, trustee, director, agent or employee shall be a duly and regularly admitted attorney-at-law, shall not be held to permit or allow any such corporation or voluntary association to do the acts prohibited herein nor shall such fact be a defense upon the trial of any of the persons mentioned herein for a violation of the provisions of this section. This section shall not apply to any corporation or voluntary association lawfully engaged in a business authorized by the provisions of any existing statute, nor to a corporation or voluntary association lawfully engaged in the examination and insuring of titles to real property, nor shall it prohibit a corporation or voluntary association from employing an attorney or attorneys in and about its own immediate affairs or in any litigation to which it is or may be a party, nor shall it apply to organizations organized for benevolent or charitable purposes, or for the purpose of assisting persons without means in the pursuit of any civil remedy, whose existence, organization or incorporation may be approved by the appellate division of the supreme court of the department in which the principal office of said corporation or voluntary association may be located.

Thus am'd by L. 1911, ch. 317.

§ 3. Restrictions upon commencement of business.

No such corporation shall incur any debts until the amount of capital specified in its certificate of incorporation, as the amount of capital with which it will begin business, shall have been paid in in money or property.

Formerly L. 1890, ch. 567, § 3, as am'd by L. 1892, ch. 691; L. 1895, ch. 671.

No penalty is prescribed in case debts are incurred prior to payment of the required amount, but it would seem that if directors do permit debts to be incurred in violation of this

section they become individually liable therefor to creditors of the corporation.

One-half of the capital stock of a corporation organized under this law must be paid in within one year from its incorporation and a certificate of such payment filed. See section 5, and notes thereunder.

§ 4. Reorganization of existing corporations. Any stock corporation heretofore organized, except a moneyed or transportation corporation, or a corporation the business of which partakes of the nature of banking or insurance, may reincorporate under this chapter in the following manner: The directors of the corporation shall call a meeting of the stockholders thereof by publishing a notice, stating the time, place and object of the meeting, signed by at least a majority of them, in a newspaper of the county in which its principal business office is situated, once a week, for at least three successive weeks, and by serving upon each stockholder, at least three weeks before the meeting, a copy of such notice either personally or by depositing it in the post-office, postage prepaid, addressed to him at his last known post-office address. The stockholders shall meet at the time and place specified in the notice and organize by choosing one of the directors chairman, and a suitable secretary, and shall then take a vote of those present in person or by proxy upon the proposition to reincorporate under this chapter, and if votes representing a majority of all the stock of the corporation shall be cast in favor of the proposition, the officers of the meeting shall execute and acknowledge a certificate of the proceedings, which certificate shall also contain the statements required by section two of this chapter, and shall be filed in the offices where certificates of incorporation under this chapter are required to be filed. From the time of such filing such corporation shall be deemed to be a corporation organized under this chapter, and if originally organized or incorporated under a general law of this state, it shall

have and exercise all such rights and franchises as it has heretofore had and exercised under the laws pursuant to which it was originally incorporated, and such reorganization shall not in any way affect, change or diminish the existing liabilities of the corporation.

Formerly L. 1890, ch. 567, § 4, as am'd by L. 1892, ch. 691, and L. 1895, ch. 671.

In 1895 provisions in this section requiring the filing of by-laws, regulating the manner of adopting them, and to a certain extent the terms of the same were stricken out.

For the mode of procedure in reorganizing when the property and franchises of a domestic stock corporation have been sold by virtue of a mortgage or judgment, see Stock Corp. L., §§ 9, 10, 11, 12.

A corporation reorganized under the provisions of this section is not required to pay an organization tax. In re Consolidated Kansas City S. & R. Co., 13 App. Div. 50.

It is difficult to conceive of a case where any advantage would accrue to any existing corporation by reorganization under this section. Corporations formed under laws now repealed are not compelled to reorganize, being governed by the new laws, into which the corporation laws repealed are merged. *Close v. Potter*, 2 Misc. 1. The language of this section is permissive; it is optional with the stockholders whether they will reorganize or not. *Id.*

§ 5. Payment of capital stock. One-half of the capital stock of every such corporation shall be paid in within one year from its incorporation, or the corporation shall be dissolved, and the directors within thirty days after such payment shall make a certificate of the fact of such payment, which shall be signed and acknowledged by a majority of the directors, and verified by the president or vice-president and secretary or treasurer, and filed in the offices where the certificates of incorporation are filed. The dissolution of any such corporation for any cause shall not take away or impair any remedy against it, its stockholders or officers, for any liabilities incurred previous to its dissolution.

Formerly L. 1890, ch. 567, § 6, as am'd by L. 1892, ch. 691, § 5. *For form of certificate, see Form No. 4.*

The certificate of incorporation under section 2 of this law, and the certificate of payment of half of the capital stock, re-

quired by the foregoing section, are frequently presented simultaneously at the office of the Secretary of State for filing and recording. In such cases the last mentioned certificate has been rejected because there could be no corporation and consequently no president, vice-president, treasurer or secretary of a corporation, to properly execute said certificate, until after the filing of a certificate of incorporation, pursuant to said section 2.

Certificate of Half Payment.

This section provides that when half of the capital stock has been paid in a certificate to that effect shall be filed. No penalty is provided for failure to file the certificate. The certificate of full payment of capital stock, required by the laws in force prior to the revision of 1890, is no longer necessary, and, since said revision, the statute has contained no provision limiting the time within which the entire capital stock shall be paid in; but every holder of capital stock not fully paid is individually liable for debts of the corporation to the extent of the amount unpaid on the stock held by him. Stock Corp. Law, § 56, and notes thereunder. The board of directors may fix the time for the payment of subscriptions to the capital stock. Stock Corp. Law, § 54.

There is no provision requiring the filing of a certificate of half payment when the capital stock is increased.

Verification and Acknowledgment.

The certificate must be sworn to as well as acknowledged. An acknowledgment without verification is not sufficient. *Hardman v. Sage*, 124 N. Y. 25; *Vedder v. Mudgett*, 95 N. Y. 295; *Brown v. Smith*, 13 Hun 408, *affd.*, 80 N. Y. 650.

It has been held, where a statute requires verification by the oath of the president or vice-president and the treasurer or secretary, and it is made by one person who is both vice-president and treasurer, it is a literal compliance. *Manhattan Co. v. Kaldenberg*, 165 N. Y. 1, *revsg.* 27 App. Div. 31; *Novelty Mfg. Co. v. Connell*, 88 Hun 254, 257.

Dissolution, How Effected.

Failure to pay in half the capital stock within the statutory time merely creates a liability for a forfeiture of corporate rights. Proceedings must be taken to accomplish an actual dissolution. *Peo. v. Buffalo Stone & Cement Co.*, 131 N. Y. 140; *Peo. v. Ulster & D. R. R. Co.*, 128 N. Y. 240; *Denike v. N. Y. etc., Lime Co.*, 80 N. Y. 599; *Matter of Brooklyn El. R. R. Co.*, 125 N. Y. 434.

§ 6. Full liability corporations. Every corporation formed under this chapter may be or become a full liability corporation by inserting a statement in the cer-

tificate of incorporation, that the corporation thereby formed is intended to be a full liability corporation; and in case of an existing corporation, which is not a full liability corporation, it may become such by filing in the offices where certificates of incorporation are required to be filed, a supplemental certificate stating that thereafter the corporation intends to be a full liability corporation, which certificate shall be executed and acknowledged by the president and treasurer of the corporation or by the board of directors, and shall have annexed thereto a copy of a resolution, adopted by a two-thirds vote of the board of directors, and the written consent of all the stockholders of the corporation, authorizing and consenting to the change of the corporation to a full liability corporation. If the corporation is formed as or becomes a full liability corporation all the stockholders of the corporation shall be severally individually liable to its creditors for all its debts and liabilities, and may be joined as defendants in any action against it. No execution shall issue against any stockholder individually until execution has been issued against the corporation and returned unsatisfied, and all the stockholders shall contribute a proportionate share, according to the number of shares of stock owned by each, of the amount paid by any stockholder on a judgment recovered against him individually for a debt of the corporation, and he may recover from the other stockholders in the corporation in a joint or several action the proper portion due by them and each of them, of the amount paid by him on any such judgment.

Formerly L. 1890, ch. 567, § 7, as am'd by L. 1892, ch. 691, § 6.

For form of certificate of incorporation of full liability corporation, see post, Form No. 14.

For form of supplemental certificate by an existing business corporation to become a full liability corporation, see post, Form No. 15.

It rarely happens that persons desire to enter into a corporate enterprise in which each stockholder becomes personally liable

for the indebtedness of the corporation, therefore, very few full liability companies have been incorporated in this State.

§ 7. Consolidation of corporations. Any two or more corporations organized under the laws of this state for the purpose of carrying on any kind of business of the same or of a similar nature, which a corporation organized under this chapter might carry on, may consolidate such corporations into a single corporation, as follows: The respective corporations may enter into and make an agreement signed by a majority of their respective boards of directors and under their respective corporate seals, for the consolidation of such corporation, prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the number of directors who shall manage its affairs, not less than three, the names and post-office addresses of the directors for the first year, the term of its existence, not exceeding fifty years, the name of the town or towns, county or counties, in which its operations are to be carried on, the name of the town or city and county in this state in which its principal place of business is to be situated, the amount of its capital stock, which shall not be larger in amount than the fair aggregate value of the property, franchises and rights of such corporations, and the number of shares into which the same is to be divided, the manner of distributing such capital stock among the holders thereof, and if such corporations, or either of them, shall have been organized for the purpose of carrying on any part of its business in any place out of this state, the agreement shall so state, with such other particulars as they may deem necessary.

Formerly L. 1890, ch. 567, § 13, as am'd by L. 1892, ch. 691, § 7; L. 1895, ch. 671; L. 1901, ch. 520.

By the amendment of 1901 the words "nor more than thirteen" were stricken out.

For method of proving consolidation in court, see Gen. Corp. Law, § 9, subd. 3.

Upon consolidation of two or more corporations an organization tax is payable only upon the amount of capital stock of the new corporation in excess of the aggregate amount of capital stock of the constituent corporations. As to organization tax and fees payable upon filing and recording consolidation papers, see pages 31 and 42, post.

Consolidations under these provisions can only be affected by corporations organized under the laws of this State for the purpose of carrying on business of the same or a similar nature, and such business must be of a kind that corporations are authorized to carry on under the Business Corporations Law. See *Cameron v. N. Y. & Mt. Vernon Water Co.*, 133 N. Y. 336, 62 Hun 269; *Young v. Rondout & Kingston Gas Lt. Co.*, 129 N. Y. 57. See, also, *People v. North River Sugar Refg Co.*, 121 N. Y. 582; *Cole v. Millerton I. Co.*, 133 N. Y. 164.

Upon consolidation the constituent corporations cease to exist and an entirely new corporation comes into existence. *Peo. ex rel. N. Y. Phonograph Co. v. Rice*, 57 Hun 486, affd., 128 N. Y. 591; *Shields v. Ohio*, 95 U. S. 319; *Railroad v. Georgia*, 98 U. S. 359; *Railroad v. Maine*, 96 U. S. 499.

A contract between two corporations is not vitiated by the fact that some of the officers were directors in both corporations, in the absence of fraud or bad faith on their part. *Genesee Valley & Wyoming Ry. Co. v. Retsof Mining Co.*, 15 Misc. 187.

§ 8. Submission of consolidation agreement to stockholders. Such agreement shall be submitted to the stockholders of each of such corporations, at a meeting thereof to be called upon notice of at least two weeks, specifying the time, place and object thereof, and addressed to each at his last known post-office address, and deposited in the post-office, postage prepaid, and published for at least two successive weeks in one of the newspapers in each of the counties of this state in which either of such corporations shall have its place of business, and if such agreement shall be approved at each of such meetings of the respective stockholders separately, by the vote by ballot of the stockholders owning at least two-thirds of the stock, the same shall be the agreement of such corporations, and a sworn copy of the proceedings of such meetings, made by the secretaries thereof, respectively, and attached thereto, shall be presumptive evidence of the holding and action of such meetings.

Such agreement and verified copy of proceedings of such meetings shall be made in duplicate, one of which shall be filed in the office of the secretary of state, and the other in the office of the clerk of the county where the principal business office of the new corporation is to be situated in this state, and thereupon such corporation shall be merged into the new corporation specified in such agreement, to be known by the corporate name therein mentioned, and the provisions of such agreement shall be carried into effect as therein provided. If any stockholder, not voting in favor of such agreement to consolidate, shall at such meeting, or within twenty days thereafter, object to such consolidation and demand payment for his stock, such stockholder or such new corporation, if the consolidation takes effect at any time thereafter, may at any time within sixty days after such meeting apply to the supreme court at any special term thereof held in the district in which any county is situated in which such new corporation may have its place of business, upon at least eight days' notice to the new corporation, for the appointment of three persons to appraise the value of such stock, and the court shall appoint three such appraisers and designate the time and place of their first meeting, with such directions in regard to their proceedings as shall be deemed proper, and also direct the manner in which payment for such stock shall be made to such stockholder. The court may fill any vacancy in the board of appraisers occurring by refusal or neglect to serve or otherwise. The appraisers shall meet at the time and place designated, and they or any two of them, after being duly sworn honestly and faithfully to discharge their duties, shall estimate and certify the value of such stock at the time of such dissent, and deliver one copy to such new corporation, and another to such stockholder if demanded; the charges and expenses of the

appraisers shall be paid by the new corporation. When the new corporation shall have paid the amount of such appraisal, as directed by the court, such stockholder shall cease to have any interest in such stock and in the corporate property of such corporation, and such stock may be held or disposed of by such new corporation. Where any consolidation has been heretofore or shall be hereafter effected pursuant to the laws of this state, and the holders of ninety per centum of the capital stock of each of such corporations have voted in favor of such agreement to consolidate, if any stockholder not voting in favor of such consolidation shall fail to exchange his stock for stock of such new corporation within sixty days after this act shall go into effect, or, in case of a consolidation hereafter effected, within sixty days after he shall have become entitled to make such exchange, such new corporation may, at any time thereafter, upon at least eight days' notice to such stockholder, to be given personally, within the state, if possible, and if not, then in such manner as the court shall direct, apply to the court, as hereinbefore provided, for the appointment of three persons to appraise the value of such stock at the time of the expiration of such sixty days. Upon the completion of the appraisal in the manner hereinbefore provided for, and the payment by such new corporation of the amount of such appraisal, as directed by the court, such stockholder shall cease to have any interest in such stock, and in the corporate property of such corporation, and such stock may be held or disposed of by such new corporation.

Formerly L. 1890, ch. 567, § 14, as am'd by L. 1892, ch. 691, § 9; L. 1892, ch. 438.

The section number was changed to 8 by the Consolidated Laws of 1909, ch. 12.

§ 9. Powers of consolidated corporations. Such new corporation in addition to the general powers of cor-

porations shall enjoy the rights, franchises and privileges possessed by each of the corporations so consolidated, subject to the restrictions, liabilities, duties and provisions contained in this chapter so far as the same may be applicable to the purposes for which it shall have been organized and expressed in the agreement for consolidation, and may prosecute or carry on any kind of business which each of the consolidating corporations was authorized by law to conduct.

Formerly L. 1890, ch. 567, § 15, as am'd by L. 1892, ch. 691, § 10. The section number was changed to 9 by L. 1909, ch. 12 (Consolidated Laws).

§ 10. Transfer of property of old corporations to consolidated corporations. Upon the consummation of such act of consolidation, all the rights, privileges, franchises and interests of each of the corporations, parties to the same, and all the property, real, personal and mixed, and all the debts due on whatever account to either of them, as well as all stock subscriptions and other things in action belonging to either of them, shall be taken and deemed to be transferred to and vested in such new corporation, without further act or deed; and all claims, demands, property and every other interest shall be as effectually the property of the new corporation as they were of the former corporations, parties to such agreement and act; and the title to all real estate, taken by deed or otherwise, under the laws of this state, vested in either of such corporations, parties to such agreement and act, shall not be deemed to revert or be in any way impaired by reason of this chapter, or anything done by virtue thereof, but shall be vested in the new corporation by virtue of such act of consolidation; and all the rights, privileges, franchises and property of the corporations, parties to any consolidation heretofore made under this chapter, shall vest as fully in the new corpora-

tion thereby created as they were vested in the corporations, parties to such consolidations.

Formerly L. 1890, ch. 567, § 16, as am'd by L. 1892, ch. 691, § 11; L. 1902, ch. 457. The section number was changed to 10 by L. 1909, ch. 12 (Consolidated Laws).

By the amendment of 1902, ch. 457, it was provided that upon consolidation the properties of the constituent corporations are vested in the new corporation without being mentioned in the consolidation agreement, and the title of properties of corporations consolidated previous to that amendment are also vested in the new corporation the same as though this provision were then in force.

§ 11. Rights of creditors of old corporations. The rights of creditors of any corporation that shall be so consolidated shall not in any manner be impaired, nor any liability or obligation for the payment of any money due or to become due to any person or persons, or any claim or demand for any cause existing against any such corporation or against any stockholder thereof be released or impaired by any such consolidation; but such new corporation shall succeed to and be held liable to pay and discharge all such debts and liabilities of each of the corporations consolidated in the same manner as if such new corporation had itself incurred the obligation or liability to pay such debt or damages and the stockholders of the respective corporations consolidated shall continue, subject to all the liabilities, claims and demands existing against them as such, at or before the consolidation; and no action or proceeding then pending before any court or tribunal in which any corporation that may be so consolidated is a party, or in which any such stockholder is a party, shall abate or be discontinued by reason of such consolidation, but may be prosecuted to final judgment, as though no consolidation had been entered into; or such new corporation may be substituted as a party in place of any corporation so consolidated, by order of the court in which such action or proceeding may be pending.

Formerly L. 1890, ch. 567, § 17, as am'd by L. 1892, ch. 691,

§ 12. The section number was changed to 11 by L. 1909, ch. 12.

The remedy of a person who is entitled to recover moneys from a corporation is not impaired by the fact that such corporation has transferred its assets to another company formed by the consolidation of itself and another corporation. *Wilson v. Mechanical Orguinette Co.*, 170 N. Y. 542.

§ 12. District steam corporations. Any corporation now or hereafter incorporated for the purpose of supplying steam to consumers from a central station or stations through pipes laid in the public streets, shall be known as a district steam corporation and upon the application in writing of the owner or occupant of any building or premises, within one hundred feet of any street main laid down by any such corporation, and payment by him of all money due from him to it, such corporation shall supply steam as may be required for heating such building or premises, notwithstanding there may be rent or compensation in arrears for steam supplied, or for meter, pipe or fittings furnished to a former occupant thereof, unless such owner or occupant shall have undertaken or agreed with the former occupant to pay or to exonerate him from the payment of such arrears, and shall refuse or neglect to pay the same; and if, for the space of twenty days after such application, and the deposit, if required, of a reasonable sum to cover the cost of connection and two months' steam supply, the corporation shall refuse or neglect to supply steam as required, it shall forfeit to such applicant the sum of ten dollars and the further sum of five dollars for every day thereafter during which such refusal or neglect shall continue; but no such corporation shall be required to lay a service pipe for the purpose of supplying steam to any applicant where the ground in which such pipe is required to be laid shall be frozen, or otherwise present serious obstacles to laying the same, nor unless the applicant, if required, shall deposit in advance with the cor-

poration a sum of money sufficient to pay for two months' steam supply and the costs of the necessary connections and of the erection of a meter and such other special apparatus as are required for use in connection with such steam supply, nor unless the applicant shall provide the space and right of way necessary for the erection, maintenance and use of such connections and apparatus, and signify his assent in writing to the reasonable regulations of the corporation with reference to the supply of steam to consumers.

Formerly L. 1890, ch. 567, § 18, as am'd by L. 1892, ch. 691, § 13. Section number changed to 12 by L. 1909, ch. 12.

The logical place for the provisions of sections 12, 13 and 14 would seem to be in the Transportation Corporations Law, where corporations of similar character are grouped.

§ 13. Examination of meters by agent of district steam corporations. Any such corporation may make an agreement with any of its customers, by which any of its officers or agents shall be authorized at all reasonable times to enter any dwelling, store, building, room or place, supplied with steam by such corporation and occupied by such customer, for the purpose of inspecting and examining the meters, devices, pipes, fittings and appliances for supplying or regulating the supply of steam, and for ascertaining the quantity of steam consumed, or the quantity of water resulting from the condensation of steam consumed. Every such agreement shall further provide that such officer or agent shall exhibit his written authority if requested by the occupant of such dwelling, store, building, room or place. Any person who shall directly or indirectly prevent or hinder such officer or agent from entering such dwelling, store, building, room or place, or from making such inspection or examination, in violation of such agreement, shall forfeit to the corporation the sum of twenty-five dollars for each offense.

Formerly L. 1890, ch. 567, § 19, as am'd by L. 1892, ch. 691, § 14. Section number changed to 13 by L. 1909, ch. 12.

§ 14. Entry by agent of district steam corporation to cut off steam. If any person or persons, corporation or association supplied with steam by any such corporation, shall neglect or refuse to pay the rent or remuneration for such steam, or for the meter, device, pipes, fittings or appliances, let by such corporation for supplying steam, or for ascertaining the quantity of steam consumed, or the quantity of water resulting from the condensation of the steam consumed, agreed upon or due for the same, as required by his, their or its contract with such corporation, the latter may thereupon stop and prevent the steam from entering the premises of such person, persons, corporation or association, so neglecting or refusing to pay such rent or remuneration, and may also in any case, in which a person is liable to pay a forfeiture, or to a fine or imprisonment, by reason of any act to or towards such corporation or its property for which such forfeiture, fine or penalty is imposed by law, stop and prevent the steam from entering the premises of the person so liable, or if such person be an officer or agent of any corporation or association, stop and prevent the steam from entering the premises of such corporation or association. In all cases in which such corporation is authorized to stop and prevent the steam from entering any premises, it may, by its officers, agents or workmen, enter into or on such premises between the hours of eight o'clock in the forenoon and six o'clock in the afternoon and cut off, disconnect, separate and carry away any meter, device, pipe, fitting or other property of the corporation; and may cut off, disconnect and separate any meter, device, pipe or fitting, whether the property of the corporation or not, from the mains or pipes of such corporation.

Formerly L. 1890, ch. 567, § 20, as am'd by L. 1892, ch. 691, § 15. Section number changed to 14 by L. 1909, ch. 12.

§ 15. Water companies. No corporation shall be formed under this chapter for the purpose of accumulating, storing, conducting, furnishing or supplying water for domestic, manufacturing or municipal purposes in the city of New York.

Any corporation formed for the purpose of supplying any other city of the state with water, if unable to agree with the owners of any real property required for the purpose of the corporation for the purchase thereof may acquire title thereto by condemnation.

Formerly L. 1890, ch. 567, added by L. 1892, ch. 691, as am'd by L. 1909, ch. 240. The only amendment made by the latter act was the insertion, after the word "domestic," of a comma, which had been omitted by the Consolidated Law of 1909, ch. 12.

In the foregoing section, implied authority appears to be given for forming corporations under this law "for the purpose of accumulating, storing, conducting, furnishing or supplying water for domestic, manufacturing or municipal purposes," except in the city of New York. It should be observed, however, that the second section of this law, page 2, prohibits the formation, under the Business Corporations Law, of any kind of corporation that may be formed under any other general law of the State, and that this prohibition would apply to a certain class of water corporations specially provided for in the Transportation Corporations Law, section 80, to wit: Corporations "for the purpose of supplying water to any of the cities, towns or villages, and the inhabitants thereof in this State." It would seem, therefore, that water companies for other purposes may incorporate under the Business Corporations Law, provided their operations are not to be conducted in New York city. In the Matter of the New York & White Plains Suburban Water Company, a certificate of incorporation drawn under the Business Corporations Law, stated the objects of the proposed corporation to be "to acquire water by purchase, development or otherwise; to construct reservoirs or water towers, erect pumping machinery, laying of water mains, pipes, gates, valves and hydrants; to furnish and sell water to manufacturing, private corporations and individuals for fire protection, manufacturing and domestic use, and collect payment or rentals for the same." The certificate was referred to the Attorney-General, Hon. Simon W. Rosendale. In his opinion, dated April 17, 1893, he held as follows: " * * * It (the Transportation Corporations Law) makes no provision for furnishing water for manufacturing or hydraulic purposes; I am

of the opinion that under said Business Corporations Law, corporations may be formed for such purposes and the purposes set forth in this certificate. This opinion is strengthened by the implied authority given in section 16 (now 15) of the Business Corporations Law."

§ 16. Improvement corporations; right of condemnation. Any corporation formed for the purpose of developing or improving real property, which lays out for public use roads, streets, avenues or highways, upon or through its lands, if unable to agree with the owners of any real property required for the purpose of extending, continuing or connecting such roads, streets, avenues or highways, for the purchase thereof, may acquire title thereto by condemnation in the manner prescribed by law; provided such corporation has the consents of the owners of not less than one-half of all of the land which adjoins or abuts upon, or which will adjoin or abut upon, such roads, streets, avenues or highways, or their extensions, continuations or connections, when completed; and such corporation may lay out and establish such roads, streets, avenues or highways, and the extensions, continuations or connections thereof, and may construct drains or sewers, and such bridges or culverts as may be necessary to maintain the grades of, or for the extension, continuation or connection of, the roads, streets, avenues or highways, so laid out; and may connect such roads, streets, avenues or highways, with or across roads, streets, avenues or highways, belonging to any other corporation or person, but may not disturb the established grades thereof. All lands so taken by condemnation shall be deemed to be acquired for a public use.

Formerly § 17, added by L. 1900, ch. 518.

ARTICLE 3

Laws Repealed; When to Take Effect

Section 25. Laws repealed.

26. When to take effect.

§ 25. **Laws repealed.** Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column in hereby repealed.

§ 26. **When to take effect.** This chapter shall take effect immediately.

SCHEDULE OF LAWS REPEALED.

Laws of Chapter Section	Laws of Chapter Section
1868..... 161..... All	1896..... 460..... All
1871..... 820..... All	1900..... 518..... All
1876..... 363..... All	1901..... 520..... All
1887..... 561..... All	1902..... 438..... All
1890..... 567..... All	1902..... 457..... All
1892..... 691..... All	1903..... 525..... All
1895..... 671..... All	1904..... 446..... All
1896..... 369..... All	1907..... 646..... All

TAX UPON ORGANIZATION

Provisions of the Tax Law in Relation to the Payment of Organization Tax by Corporations

[The following is section 180 of chapter 62, Laws of 1909, entitled "An act in relation to taxation, constituting chapter sixty of the consolidated laws." The provisions of the Consolidated Tax Law regulating the annual taxation of corporations are published elsewhere in this volume. See the index under "Taxation."]

§ 180. Organization tax. Every stock corporation incorporated under any law of this state shall pay to the state treasurer a tax of one-twentieth of one per centum upon the amount of capital stock which the corporation is authorized to have, and a like tax upon any subsequent increase. Provided, that in no case shall such tax be less than five dollars. Such tax shall be due and payable upon the incorporation of such corporation or upon the increase of its capital stock. Except in the case of a railroad corporation neither the secretary of state nor county clerk shall file any certificate of incorporation or article of association, or give any certificate to any such corporation or association until he is furnished a receipt for such tax from the state treasurer, and no stock corporation shall have or exercise any corporate franchise or powers, or carry on business in this state until such tax shall have been paid. And in case of a decrease of capital stock, upon which the tax required by law has been paid, and a subsequent increase thereof, a tax shall be paid only upon so much of such increase as exceeds the amount of capital stock upon which a tax

has been before paid. In case of the consolidation of existing corporations into a corporation, such new corporation shall be required to pay the tax hereinbefore provided for only upon the amount of its capital stock in excess of the aggregate amount of capital stock of said corporations. This section shall not apply to state and national banks or to building, mutual loan, accumulating fund and co-operative associations. A railroad corporation need not pay such tax at the time of filing its certificate of incorporation, but shall pay the same before the public service commission shall grant a certificate, as required by the railroad law, authorizing the construction of the road as proposed in its articles of association, and such certificate shall not be granted by the public service commission until it is furnished with a receipt for such tax from the state treasurer. If the board of railroad commissioners or public service commission shall have heretofore granted, or the public service commission shall hereafter grant, such certificate and upon an appeal from the determination of such board of railroad commissioners or public service commission, such certificate has been or may hereafter be denied the comptroller shall refund the amount of tax so paid to the railroad corporation or corporations by which such tax was paid, upon proof of payment being presented and appropriation being made therefor.

Formerly L. 1896, ch. 908, § 180, as am'd by L. 1897, ch. 369; L. 1901, ch. 448, and L. 1906, ch. 524.

Thus am'd by L. 1910, ch. 472, and L. 1911, ch. 91.

The provisions imposing a tax for the privilege of organizing stock corporations in this State were first enacted by L. 1886, ch. 143, which was subsequently amended by L. 1887, ch. 284, and L. 1892, ch. 668. These provisions were superseded and re-enacted as section 180 of the Revised Tax Law of 1896, ch. 908, and are now embodied in the Consolidated Tax Law of 1909, ch. 62, retaining the same section number.

Laws of 1901, ch. 448, reduced the tax payable under this section from one-eighth to one-twentieth of one per cent.

The sentence providing that when the capital stock is de-

creased and subsequently increased the tax is payable only on the amount, if any, in excess of the original capitalization, was inserted by L. 1906, ch. 524.

The tax imposed by section 180 not being a property tax, the power of the State to subject corporations to any conditions the legislature may see fit to impose cannot be questioned. *Peo. v. N. Y., C. & St. L. R. R. Co.*, 129 N. Y. 476.

Companies which have paid the tax have no greater rights than those which were incorporated before 1886, and, therefore, paid no tax. *Peo. ex rel. N. Y. Phonograph Co. v. Rice*, 57 Hun 486, *affd.*, 128 N. Y. 591.

Under the provisions of this section as originally enacted by L. 1886, ch. 143, it was held that the organization tax was payable upon the consolidation of two or more corporations. *Peo. ex rel. N. Y. Phonograph Co. v. Rice*, 57 Hun 486, *affd.*, 128 N. Y. 591. In 1892, chapter 668 amended the section by providing that upon the consolidation of two corporations the tax should be payable only upon the amount of capital stock in excess of the aggregate capitalization of the constituent corporations. Under this amendment it was held that two or more corporations might consolidate without paying an organization tax except upon the capital stock in excess of the total of the constituent corporations. *Peo. ex rel. Eickemeyer-Field Co. v. Rice*, 66 Hun 130, *affd.*, 138 N. Y. 614. Thereafter the provisions of the law were amended to conform to the last-mentioned decision.

An organization tax must be paid upon a reorganization of a corporation under L. 1874, ch. 430, as amended by L. 1876, ch. 446 (now repealed and superseded by sec. 9, Stock Corp. Law, *post*). *Peo. ex rel. Schurz v. Cook*, 110 N. Y. 443, *affd.*, 148 U. S. 397; *Peo. ex rel. Mertens v. Cook*, *id.*, *affd.*, 154 U. S. 512. In such case the right to be a corporation, possessed by the old corporation, was not mortgaged nor sold, and so did not pass to the purchasers. They obtain such right upon filing the certificate, and then only by direct grant of the State. *Id.*

A corporation reorganized under the provisions of section 4 of the Business Corporations Law is not required to pay an organization tax. In *re Consolidated Kansas City S. & R. Co.*, 13 A. D. 50, overruling *Matter of N. Y. & Suburban Investment Co.*, 16 N. Y. Supp. 213, 40 St. Rep. 139.

The authority conferred by L. 1874, ch. 430 (now Stock Corp. Law, § 9) upon purchasers of a foreclosure sale of a railroad, to organize a corporation to receive and hold the purchased property, creates no contract with the State. *Peo. ex rel. Schurz v. Cook*, 148 U. S. 397, *affg.* 110 N. Y. 443.

TAX UPON ORGANIZATION.

Organization Tax Table, Showing One-twentieth of one Per Cent. on Various Amounts.

Capital Stock.	Tax.	Capital Stock.	Tax.
\$500	*\$5 00	\$175,000	\$87 50
600	*5 00	200,000	100 00
700	*5 00	225,000	112 50
800	*5 00	250,000	125 00
900	*5 00	275,000	137 50
1,000	*5 00	300,000	150 00
1,500	*5 00	325,000	165 50
1,800	*5 00	350,000	175 00
2,000	*5 00	375,000	187 50
2,500	*5 00	400,000	200 00
2,800	*5 00	425,000	212 50
3,000	*5 00	450,000	225 00
3,500	*5 00	475,000	237 50
4,000	*5 00	500,000	250 00
4,500	*5 00	525,000	262 50
5,000	*5 00	550,000	275 00
5,500	*5 00	575,000	287 50
6,000	*5 00	600,000	300 00
6,500	*5 00	625,000	312 50
7,000	*5 00	650,000	325 00
7,500	*5 00	675,000	337 50
8,000	*5 00	700,000	350 00
8,500	*5 00	725,000	362 50
9,000	*5 00	750,000	375 00
9,500	*5 00	775,000	387 50
10,000	5 00	800,000	400 00
12,000	6 00	825,000	412 50
15,000	7 50	850,000	425 00
18,000	9 00	875,000	437 50
20,000	10 00	900,000	450 00
25,000	12 50	925,000	462 50
30,000	15 00	950,000	475 00
35,000	17 50	975,000	487 50
40,000	20 00	1,000,000	500 00
45,000	22 50	1,250,000	625 00
50,000	25 00	1,500,000	750 00
55,000	27 50	1,750,000	875 00
60,000	30 00	2,000,000	1,000 00
65,000	32 50	3,000,000	1,500 00
70,000	35 00	5,000,000	2,500 00
75,000	37 50	10,000,000	5,000 00
80,000	40 00	15,000,000	7,500 00
85,000	42 50	20,000,000	10,000 00
90,000	45 00	25,000,000	12,500 00
95,000	47 50	50,000,000	25,000 00
100,000	50 00	75,000,000	37,500 00
125,000	62 50	100,000,000	50,000 00
150,000	75 00	500,000,000	250,000 00

* The statute, Tax Law, § 180, as amended, provides that five dollars shall be the minimum amount of organization tax to be paid by any corporation.

LICENSE TAX--FOREIGN CORPORATIONS

Provisions of the Tax Law Relative to the Payment of a License Tax by Foreign Corporations

[The following is section 181 of chapter 62, L. 1909, entitled "An act in relation to taxation, constituting chapter sixty of the consolidated laws." The provisions of the Consolidated Tax Law regulating the annual taxation of foreign corporations are published elsewhere in this volume. See the index under "Taxation."]

§ 181. License tax on foreign corporations. Every foreign corporation, except banking corporations, fire, marine, casualty and life insurance companies, co-operative fraternal insurance companies, and building and loan associations, authorized to do business under the general corporation law, shall pay to the state treasurer, for the use of the state, a license fee of one-eighth of one per centum for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, to be computed upon the basis of the capital stock employed by it within this state, during the first year of carrying on its business in this state; and if any year thereafter any such corporation shall employ an increased amount of its capital stock within this state, the same license fee shall be due and payable upon any such increase. The measure of the amount of capital stock employed in this state shall be such a portion of the issued capital stock as the gross assets employed in any business within this state bear to the gross assets wherever employed in business. For

purposes of taxation, the capital of a corporation invested in the stock of another corporation shall be deemed to be assets located where the physical property represented by such stock is located. The amount of capital upon which such taxes shall be paid shall be fixed by the comptroller, who shall have the same authority to examine the books and records in this state of such foreign corporations, and the employees thereof, and the same power to issue his warrant for the collection of such taxes, as he now has with regard to domestic corporations. No action shall be maintained or recovery had in any of the courts in this state by such foreign corporation after thirteen months from the time of beginning such business within the state, without obtaining a receipt from the comptroller for the payment of the license fee upon the capital stock employed by it within this state during the first year of carrying on its business in this state.

Formerly § 181, ch. 908, L. 1896, as am'd by L. 1901, ch. 558, and L. 1906, ch. 474.

Thus am'd by L. 1910, ch. 340.

By the amendment of 1901, chapter 558, the exemption theretofore existing in favor of foreign corporations "wholly engaged in carrying on manufactures in this State" was stricken out, and a provision inserted placing such corporations upon the same basis as other foreign corporations respecting this license tax. Another new provision is the requirement that when any corporation subject to this license tax shall employ an increased amount of capital stock within the State, the same license tax shall be payable upon such increase.

It will be noticed that the rate of this tax, payable by foreign corporations for the privilege of doing business within the State, remains at one-eighth of one per cent., while the rate for the organization of domestic corporations has been reduced to one-twentieth of one per cent., thereby intentionally discriminating in favor of the organization of corporations under the laws of the State of New York.

The provisions imposing a license tax upon foreign corporations for the privilege of doing business in this State were first enacted by L. 1895, ch. 240. The provisions of that act were substantially re-enacted as section 181 of the Revised Tax Law of 1896, ch. 908, which is now embodied in the above section of the Consolidated Tax Law.

This section is not intended to prohibit compliance after the

time prescribed by law. *Dunbarton F. S. Co. v. G. & J. Ry. Co.*, 87 App. Div. 21.

The provisions of the foregoing section cannot avail as a defense to an action brought by the assignee of a foreign corporation which has not paid the license fee in question, where the defendant merely introduces inconclusive testimony tending to show that such corporation was doing business within the State at the time of the trial of the action, and offers no proof in this regard as to any anterior period. *Stern v. Childs*, 26 Misc. 419.

The fact that a foreign corporation, more than thirteen months after beginning to do business in the State, and at the time of commencing an action, had ceased to do business, does not exempt it from paying the license tax. *Kinney v. Reid Ice-Cream Co.*, 57 App. Div. 206.

Contracts are not rendered void because of non-compliance with this section, and they may be enforced in the Federal Courts. *Groton Bridge & Mfg. Co. v. Am. Bridge Co.*, 151 Fed. 871.

In determining the value of patents, the Comptroller is justified in concluding that they were worth the par value of the stock issued in payment therefor. *Peo. ex rel. Automatic Vending Co. v. Kelsey*, 90 App. Div. 545.

Where a foreign corporation has been doing business within the State for more than thirteen months without having paid a license tax, it has no right to maintain an action in the courts of this State, and its assignee can have no standing in court, for the reason that the assignee cannot be in a better position than the assignor. *Kinney v. Reid Ice-Cream Co.*, 57 App. Div. 206. This case was decided prior to the enactment of chapter 533, Laws of 1901, amending section 15 of the General Corporation Law. Said amendment expressly provides that the assignee shall have no right of action in the State courts where the assignor, being a foreign corporation, has failed to comply with the provisions of said section.

The provisions of this section constitute a condition subsequent to the right of a foreign corporation to carry on business within the State, and a complaint in an action by such a corporation is not defective for failure to allege compliance with this section, non-compliance being a matter of defense to be availed of by answer; but the requirement of section 15 of the General Corporation Law is a condition precedent to the right of a foreign corporation to make enforceable contracts in the State and compliance must be pleaded. *Wood & Selick v. Ball*, 190 N. Y. 217, affg. 114 App. Div. 743, and explaining *Welsbach Co. v. Norwich G. & E. Co.*, 96 App. Div. 52, affd., 180 N. Y. 533, and *Parmelee Co. v. Haas*, 171 N. Y. 579. To same effect as 190 N. Y. 217, supra, see *Halsey v. Jewett Dramatic Co.*, 190 N. Y. 231, revsg. 114 App. Div. 420.

The acceptance of a license tax by the State Treasurer, although seemingly implying an authority to do business in this State, would not constitute a waiver by the State of the requirements of sections 15 and 16 of the General Corporation Law,

which make the issuance of a certificate of authority before the making of a contract, a prerequisite to the maintaining of an action thereunder. *Emmerich Co. v. Sloane*, 108 App. Div. 330.

For provisions requiring foreign corporations to obtain a certificate of authority to do business within the State and the proof to be filed with the Secretary of State in order to procure said certificate see sections 15 and 16 of the General Corporation Law, and see also notes under said sections for numerous important decisions affecting such corporations.

FILING AND RECORDING FEES

Fees Payable to the Secretary of State and County Clerks Upon Filing and Recording Corporation Certificates

Secretary of State.—The fees to be collected by the Secretary of State, in connection with corporation certificates, are regulated by the Executive Law (L. 1909, chap. 23), section 26, which provides as follows:

Fees. The secretary of state shall collect the following fees:

* * * * *

2. For searching the records in his office for any one year and for every other year in which such search is made, six cents.

3. For a copy of any paper or record not required to be certified or otherwise authenticated by him, ten cents per folio.

4. For a certified or exemplified copy of any law, record or paper, fifteen cents per folio, and one dollar additional for the certificate under seal of his office, attached thereto.

5. For a certificate under the great seal of the state, one dollar.

6. For recording a certificate, notice or other paper required to be recorded, except as otherwise provided by this section, fifteen cents per folio.

7. For a certificate of the official character of a commissioner of deeds residing in another state or a foreign country, twenty-five cents, and for every other certificate under the seal of his office, one dollar.

* * * * *

12. For filing and recording the original certificate of incorporation of a railroad corporation for the construction of a railroad in a foreign country, fifty dollars; for filing the original certificates of every other railroad corporation, twenty-five dollars; for filing the original certificate of any other stock corporation, ten dollars; for filing any original certificate of incorporation drawn under article three of the membership corporations law, ten dollars.

13. For filing the certificate of a foreign corporation desiring to do business in the state, ten dollars.

* * * * *

17. For a certificate under subdivision three of section nine of the general corporation law, ten dollars.

Formerly Executive Law of 1892, ch. 683, § 26, as am'd by L. 1897, ch. 411; L. 1904, ch. 26; L. 1907, ch. 213.

The amendment of 1897 added the last clause prescribing a filing fee of ten dollars for certificates of incorporation drawn under article two of the Membership Corporations Law (L. 1895, ch. 559).

Subdivision 17, *supra*, was added by L. 1907, ch. 213.

The Executive Law, above mentioned, repealed the fee bill of 1882, ch. 156, which previously regulated the filing, recording and miscellaneous fees payable at the office of the Secretary of State.

Fees Payable to State Comptroller.

Fees. The comptroller shall collect the following fees:

1. For copies of all papers and records not required to be certified or otherwise authenticated by him, ten cents per folio.

2. For certified or exemplified copies of all records and papers, fifteen cents per folio.

3. For every certificate under the seal of his office, one dollar.

* * * * *

Executive Law (L. 1909, ch. 23), § 42.

County Clerks.—The provisions as to fees payable to county clerks are contained in the Code of Civil Procedure, section 3304, as amended by Laws of 1896, ch. 572, as follows:

- **§ 3304. Fees of county clerks generally.** A county clerk is entitled, for the services specified in this section, except where another fee is allowed therefor by special statutory provision, to the following fees to be paid in advance:

* * * * *

For a copy of an order, record, or other paper, entered or filed in his office, eight cents for each folio.

* * * * *

For recording any instrument, which must or may legally be recorded by him, ten cents for each folio.

* * * * *

For filing any paper required by law to be filed in his office, other than as expressly provided for in this section, six cents.

Transmission of Papers and Payments.

When corporation papers are transmitted by mail for filing at Albany, the most satisfactory and expeditious results will be secured by observing the following suggestions, to wit:

The tax of one-twentieth of one per cent. upon the capital stock for the privilege of organization of a stock corporation (or for an increase of capital stock) should be remitted directly to State Treasurer, Albany, N. Y. All such tax payments exceeding in amount the sum of twenty-five dollars, are required, by a rule of the Treasurer's office, to be made in cash or by certified check, New York draft, post-office money order or express order.

All corporation certificates should be mailed in a separate enclosure, addressed to Secretary of State, Albany, N. Y., together with the filing and recording fees of that office.

Do not forward to the State Treasurer any certificate intended for filing in the office of the Secretary of State, as is often done. On the other hand, do not send the organization tax to the Secretary of State. The statute provides for its payment to the State Treasurer, who will upon receiving such payment, if the same be in acceptable form, as above required, immediately notify the Secretary of State to that effect, and the latter official will simultaneously, if the certificate is unobjec-

tionable, give notice to apply the tax and issue receipts therefor.

Consolidated Table of Fees.

The payments to be made to State and county officials for filing, recording or certifying papers authorized by the laws relating to stock corporations published in this book are as follows:

INCORPORATION.

- (1) State Treasurer... Organization tax of one-twentieth of one per cent. on the amount of capital stock authorized in the certificate.
- (2) Sec'y of State.... Filing charter of all stock corporations, except railroads, \$10; recording, 15 cents per folio; certified copy, 15 cents per folio, plus \$1 for the official certificate under seal; exemplified copy, for use in other States, the same fees as for a certified copy, plus \$1 for the additional certificate under the Great Seal of the State.
- (3) County Clerk.... Filing fee, 6 cents; recording, 10 cents per folio; certified copy, 8 cents per folio.

PAYMENT OF ONE-HALF CAPITAL STOCK.

- Sec'y of State..... Fee for recording certificate, 15 cents per folio.
- County Clerk..... Filing fee, 6 cents; recording, 10 cents per folio.

MERGER OF CORPORATIONS.

- Sec'y of State..... A recording fee only, 15 cents per folio.
- County Clerk..... Filing fee, 6 cents; recording, 10 cents per folio.

CONSOLIDATION OF CORPORATIONS.

- State Treasurer..... An organization tax is payable only on the capitalization in excess of the aggregate capital stock of the constituent corporations.
- Sec'y of State..... { Fees same as on filing and recording
- County Clerk..... { charter, except that the fee is \$10 for a certificate under G. C. L., § 9, subd. 3.

OTHER SUPPLEMENTAL CERTIFICATES.

- State Treasurer..... No payments are to be made except upon an increase of capital stock of a

	tax of one-twentieth of one per cent. on the amount of such increase.
Sec'y of State.....	Upon the filing of any supplemental certificate no filing fee is payable; recording, certifying and other fees are the same as set forth in (2), supra.
County Clerk.....	The same fees as set forth in (3), supra.
Comptroller	A certificate reducing capital stock requires Comptroller's certificate of approval in duplicate. Fee, each certificate, \$1.

CERTIFICATE OF INSPECTORS OF ELECTION.

County Clerk.....	Filing fee, 6 cents.
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CONSENT TO MORTGAGE.

County Clerk.....	For filing stockholders' consent, 6 cents; recording fee, 10 cents per folio.
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ANNUAL REPORTS.

Sec'y of State.....	No fee.
Comptroller	Tax report; no fee.
Local Assessors.....	Tax report; no fee.

DISSOLUTION BY INCORPORATORS, UNDER G. C. L. § 220.

Sec'y of State.....	No fee prescribed.
County Clerk.....	Filing fee, 6 cents; recording, 10 cents per folio.

DISSOLUTION WITHOUT JUDICIAL PROCEEDINGS, UNDER G. C. L. § 221.

Sec'y of State.....	No filing fee prescribed. Duplicate certificates of filing, \$1 each.
County Clerk.....	For filing the certificate issued by the Secretary of State, 6 cents; recording fee, 10 cents per folio.

CHANGE OF CORPORATE NAME.

Sec'y of State.....	Certificate that proposed name does not conflict, \$1; recording affidavit of publication of order, 15 cents per folio. No fee is payable for filing copy of petition and notice of motion, required to protect proposed name pending the proceedings, nor for filing copy of court order, certified by county clerk.
County Clerk.....	Filing order; 6 cents; recording, 10 cents per folio; certifying copy, 8 cents per folio; filing affidavit of publication of

CONSOLIDATED TABLE OF FEES.

order, 6 cents, and recording same, 10 cents per folio.

FOREIGN CORPORATIONS, PAPERS REQUIRED BY
G. C. L. §§ 15, 16.

Sec'y of State.....Filing fee, \$10; certificate of authority, \$1. No fee is prescribed for filing revocation and designation of new agent, or notice of removal of agent's office.

TRANSFERS OF STOCK, TAX UPON.

After the original issue of stock all transfers are subject to a stamp tax of 2 cents on each \$100 of face value or fraction thereof.

MORTGAGE TAX.

A recording tax of 50 cents for each \$100 of the mortgage debt is payable to the county clerk or other recording officer.

TAX ON TRANSFERS OF STOCK

Provisions of the Tax Law Relative to the Payment of a Stamp Tax on Transfers of Shares of Stock

[The following sections of the Tax Law were added by L. 1905, chap. 241, and are now embodied in the Consolidated Tax Law of 1909, chap. 62.]

§ 270. Amount of tax. There is hereby imposed and there shall immediately accrue and be collected a tax, as herein provided, on all sales, or agreements to sell, or memoranda of sales of stock, and upon any and all deliveries or transfers of shares or certificates of stock, in any domestic or foreign association, company or corporation, made after the first day of June, nineteen hundred and five, whether made upon or shown by the books of the association, company or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of sale or transfer, whether intermediate or final, and whether investing the holder with the beneficial interest in or legal title to said stock or merely with the possession or use thereof for any purpose, or to secure the future payment of money, or the future transfer of any stock, on each hundred dollars of face value or fraction thereof, two cents. It is not intended by this act to impose a tax upon an agreement evidencing the deposit of stock certificates as collateral security for money loaned thereon, which stock certificates are not actually sold, nor upon such stock certificates so deposited; nor upon mere loans of stock or the return thereof. The payment of such tax

shall be denoted by an adhesive stamp or stamps affixed as follows: In the case of sale, or transfer, where the evidence of the transaction is shown only by the books of the association, company or corporation, the stamp shall be placed upon such books; and where the transaction is effected by the delivery or transfer of a certificate the stamp shall be placed upon the certificate; and in cases of an agreement to sell, or where the sale is effected by delivery of the certificate assigned in blank, there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale to which the stamp provided for by this article shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers, and no further tax is hereby imposed upon the delivery of the certificate of stock, or upon the actual issue of a new certificate when the original certificate of stock is accompanied by the duly stamped memorandum of sale.

Formerly § 315, added by L. 1905, ch. 241, as am'd by L. 1906, ch. 414, re-enacted in the Consolidated Tax Law of 1909, ch. 62, and further am'd by L. 1910, ch. 38; L. 1911, ch. 352.

The original act imposing a tax upon transfers of stock was enacted by L. 1905, ch. 241, by the terms of which it was provided that a tax should be payable "on each \$100 of face value or fraction thereof, two cents." This law was amended by L. 1906, ch. 414, which provided for a tax as follows "on each share of \$100 of face value or fraction thereof, two cents." Thereafter the Court of Appeals held that the amendment of 1906 imposing a tax of two cents on each share of stock, irrespective of its par value, was unconstitutional as an arbitrary discrimination in favor of one as against another of the same class. *Peo. ex rel. Farrington v. Mensching*, 187 N. Y. 8. By further amendment, as appears in the foregoing section, the original phraseology as to the amount of tax has been restored, and the tax is now "on each hundred dollars of face value or fraction thereof, two cents." For example, if four shares of stock of the par value of \$25 each are transferred, the tax upon such transfer is two cents, being the same as upon the transfer of one share of the par value of one hundred dollars.

The act does not violate the commerce clause of the Federal

Constitution, because it taxes transfers of certificates of stock in foreign corporations made by non-residents in this State. *Peo. ex rel. Hatch v. Reardon*, 184 N. Y. 431, *affd.*, 204 U. S. 152.

This act does not impose a tax on the original issue of the shares of stock of a corporation. The words "sale" or "transfer" cannot be held to include the original issuance of certificates of stock. *Peo. v. Duffy-McInnerney Co.*, 122 App. Div. 336, *affd.*, 193 N. Y. 636.

The tax imposed by this section is payable where shares covered by a mortgage to secure bonds are sold on foreclosure. *Glynn v. Conklin*, 127 App. Div. 473.

The tax imposed on transfers of stock, made within the State of New York by the act of 1905, is not unconstitutional as making an arbitrary discrimination because only imposed on transfers of stock, or because based on par, and not market, value; nor does it deprive non-resident owners of stock transferring, in New York, shares of stock of non-resident corporations of their property without due process of law; nor is it as to such transfers of stock an interference with interstate commerce. *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, *affg.* 184 N. Y. 431.

§ 271. Stamps how prepared and sold. Adhesive stamps for the purpose of paying the state tax provided for by this article shall be prepared by the state comptroller, in such form; and of such denominations and in such quantities as he may from time to time prescribe, and shall be sold by him to the person or persons desiring to purchase the same; he shall make provision for the sale of such stamps in such places and at such times as in his judgment he may deem necessary.

§ 271a. Sale of stamps. No person, firm, company, association or corporation other than a corporation organized under the banking law of this state or under the national bank act of the United States, or a duly authorized agent of the comptroller, shall sell or expose for sale any stamp issued pursuant to this article, without first obtaining from the comptroller his written consent, except that in connection with a sale of or agreement to sell stock a broker or agent of the principal making such sale or agreement to sell may supply and affix the stamp or stamps required by this article. No person shall sell any stamp for a sum less than the face value thereof without

the written consent of the comptroller. Any person violating any provision of this section shall be guilty of a misdemeanor.

New section, added by L. 1911, ch. 12, in effect March 9, 1911.

§ 272. Penalty for failure to pay tax. Any person or persons liable to pay the tax by this article imposed, or any one who acts in the matter as agent or broker for such person or persons, who shall make any sale, transfer or delivery without paying the tax by this article imposed, or any person who shall in pursuance of any sale, transfer, or agreement, deliver any stock, or evidence of the sale of transfer of or agreement to sell any stock or bill or memorandum thereof, or who shall transfer or cause the same to be transferred upon the books or records of the association, company or corporation without having the stamps provided for in this article affixed thereto, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned for not more than six months, or both such fine and imprisonment, in the discretion of the court.

Thus am'd by L. 1911, ch. 352, in effect June 15, 1911.

§ 273. Canceling stamps; penalty for failure. In every case where an adhesive stamp shall be used to denote the payment of the tax provided by this article, the person using or affixing the same shall write or stamp thereupon the initials of his name and the date upon which the same shall be attached or used, and shall cut or perforate the stamp in a substantial manner, so that such stamp cannot be again used; and if any person makes use of an adhesive stamp to denote the payment of the tax imposed by this article, without so effectually canceling the same, such person shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than two hundred nor more than five

hundred dollars or be imprisoned for not less than six months, or both, in the discretion of the court.

Thus am'd by L. 1911, ch. 352, in effect June 15, 1911.

§ 274. Contracts for dies; expenses how paid. The state comptroller is hereby directed to make, enter into and execute for and in behalf of the state such contract or contracts for dies, plates and printing necessary for the manufacture of the stamps provided for by this article, and provide such stationery and clerk hire together with such books and blanks as in his discretion may be necessary for putting into operation the provisions of this article; he shall be the custodian of all stamps, dies, plates or other material or thing furnished by him and used in the manufacture of such state tax stamps, and all expenses incurred by him and under his direction in carrying out the provisions of this article shall be paid to him by the state treasurer from any moneys appropriated for such purpose.

§ 275. Illegal use of stamps; penalty. Any person who shall willfully remove or alter or knowingly permit to be removed or altered the canceling or defacing marks of any stamp provided for by this article with intent to use such stamp, or who shall knowingly or willfully buy, prepare for use, have in his possession or suffer to be used any washed, restored or counterfeit stamp, and any person who shall intentionally remove or cause to be removed or knowingly permit to be removed any stamp, affixed pursuant to the requirements of this article, except as hereinafter provided, shall be guilty of a misdemeanor and on conviction thereof shall be liable to a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned for not more than one year, or by both such fine and imprisonment, at the discretion of the court. If any such stamp shall be affixed to any memorandum of sale with the intention of paying a tax,

but delivery pursuant to such sale shall not be made in conformity with the memorandum thereof, then such stamp may be removed from such memorandum and subsequently used on some other memorandum of sale, provided that when so used there shall be attached to the memorandum, to which said stamp shall be so affixed, a written statement signed by the vendor or the agent making such sale, setting forth in detail the facts justifying such re-use.

Thus am'd by L. 1911, ch. 12, in effect March 9, 1911.

§ 276. Power of state comptroller. Every person or firm, a part of whose regular or ordinary business is the making of sales, agreements to sell, deliveries, or transfers, of shares or certificates of stock, or conducting or transacting a brokerage business, and every company, association or corporation making a sale, agreement to sell, delivery or transfer of shares or certificates of stock, or conducting or transacting a brokerage business, shall keep or cause to be kept a just and true book of account, wherein shall be plainly and legibly recorded the date of making every sale, agreement to sell, delivery, or transfer, of shares or certificates of stock, and every transaction in relation to any stock, the number of shares, the total amount covered by each such sale, agreement to sell, delivery, transfer or transaction, and the name of the other party thereto; and such book shall at all times be subject to the inspection of the comptroller, or any of his representatives, between the hours of ten o'clock in the forenoon and three o'clock in the afternoon, except on Saturdays, Sundays and legal holidays. The state comptroller may, at any time after sales or transfers of stock which by the provisions of this article are subject to a tax, inquire into and ascertain whether the tax thereby imposed has been paid. For the purpose of ascertaining such fact the comptroller shall have the right and it

shall be his duty to examine such book of account of any person, firm, company, association or corporation required to keep the same, and the bills or memoranda of sale or transfer of shares or certificates of stock; and such bills or memoranda of sale or transfer shall remain accessible for such examination for six months from their respective dates. Every association, company or corporation shall keep or cause to be kept a transfer ledger, register or stock certificate book, containing a complete and true entry and record of all sales or transfers of shares or certificates of its stock made upon its books. It shall also retain and keep all surrendered or canceled shares or certificates of its stock and all memoranda relating to the sale or transfer of any thereof; and all such transfer ledgers, registers or stock certificate books and surrendered or canceled shares or certificates of stock and memoranda relating to the sale or transfer of its stock, shall at all times between the hours of ten o'clock in the forenoon and three o'clock in the afternoon, except Saturdays, Sundays and legal holidays, be open to examination by the comptroller. The state comptroller may enforce his right to examine such books of account and bills or memoranda of sale or transfer and such transfer ledger, register and stock certificate books and surrendered or canceled shares or certificates of stock by mandamus. If the comptroller ascertains that the tax provided for in this article has not been paid, he shall bring an action in his name as such comptroller, in any court of competent jurisdiction, for the recovery of such tax and for any penalty incurred by any person under the provisions of this article. Every person, firm, company, association or corporation who shall fail to keep such book of account, or bills or memoranda of sale or transfer, or transfer ledger, register or stock certificate book or surrendered or canceled shares or certificates of stock as

herein required, or who shall refuse to permit the comptroller or any of his representatives to examine any of said books, records or papers, at any time, as above provided, or who shall in any other respect violate any of the provisions of his section shall be deemed guilty of a misdemeanor and on conviction thereof shall for each and every such offense pay a fine of not less than five hundred dollars nor more than five thousand dollars, or be imprisoned not less than three months nor more than two years, or both, in the discretion of the court.

Thus am'd by L. 1910, ch. 453, and L. 1911, ch. 352.

The provision of this section making it a misdemeanor for any person to refuse to permit the Comptroller or his representative to inspect any book, memoranda or record relating to a sale or delivery of stock is unconstitutional, being in violation of section 6 of article 1 of the Constitution of the State of New York, which provides that "no person shall be compelled in any criminal case to be a witness against himself." *Peo. ex rel. Ferguson v. Reardon*, 124 App. Div. 818.

§ 277. Civil penalty; how recovered. Any person who shall violate the provisions of this article shall in addition to the penalties herein provided forfeit to the people of the state a civil penalty of five hundred dollars for each violaion. The state comptroller shall bring an action in his name as such comptroller in any court of competent jurisdiction for the recovery of any civil penalty and all moneys collected by him shall be paid into the state treasury.

§ 278. Effect of failure to pay tax. No transfer of stock made after June first, nineteen hundred and five, on which a tax is imposed by this article, and which tax is not paid at the time of such transfer, shall be made the basis of any action or legal proceedings, nor shall proof thereof be offered or received in evidence in any court in this state.

A vendor of certificates of stock who fails to pay the stock transfer tax at the time of the transfer cannot maintain an action to recover the purchase price even though the failure

to pay the tax was inadvertent. *Sheridan v. Tucker*, 145 App. Div. 145.

§ 279. Application of taxes. The taxes imposed under this article and the revenues thereof shall be paid by the state comptroller into the state treasury and be applicable to the general fund, and to the payment of all claims and demands which are a lawful charge thereon.

§ 280. Refund of tax erroneously paid. If any stamp or stamps shall have been erroneously affixed to any book, certificate of stock, or bill or memorandum of sale, the comptroller may, upon presentation of a claim for the amount of such stamp or stamps and upon the production of evidence satisfactory to him that such stamp or stamps was or were so erroneously affixed so as to cause loss to the person or persons making such claim, pay such amount, or such part thereof as he may allow, to such claimant out of any moneys appropriated for that purpose. Such claims shall be presented to the comptroller in writing, duly verified, and shall state the full name and address of the claimant, the date of such erroneous affixing, the face value of such stamp or stamps and shall describe the instrument to which the stamp or stamps were affixed and contain such evidence as may be available upon which the demand for such refund is based. Such claims shall be presented within ninety days after such erroneous affixing unless such affixing shall have taken place prior to the date on which this act shall take effect, in which case such claim shall be presented within ninety days after the date on which this act shall take effect. If the comptroller rejects a claim or any part thereof, the claimant may file a claim for the recovery of such sum as the comptroller shall have refused to allow, with the court of claims, which shall constitute a private claim against the state and shall be subject to all the provisions of law governing such claims, except

that all claims so presented shall be filed with the court of claims within ninety days from the date on which such claim shall be rejected by the comptroller. For the purposes of this section, the comptroller's decision shall be deemed to have been made at the time of the depositing of a copy of such decision in the post-office inclosed in a duly post-paid wrapper and directed to the person making such claim at the address contained in the verified claim presented to the comptroller as hereinbefore provided.

New section, added by L. 1910, ch. 186, in effect April 29, 1910.

Rulings of State Comptroller's Office Relative to Taxes on Transfers of Stock

A circular issued from the office of the state comptroller says the following is a brief statement of the more general rules and regulations governing the imposition and collection of stock transfer taxes, prepared pursuant to the rulings made by the attorney-general:

1. The application and scope of the statute imposing this tax was considerably broadened by the amendment thereto, effected by Chapter 352 of the Laws of 1911, with the result that the rulings heretofore made asserting exemptions from the tax are as a rule not controlling.

2. By the statute as amended, a tax is imposed upon all sales or agreements to sell and upon all deliveries or transfers of shares or certificates of stock, of any and all associations, companies and corporations, whether domestic or foreign, at the rate of two cents on each hundred dollars of face value or fraction thereof.

3. The statute does not apply to the original issue of stock; but all sales or transfers made subsequent thereto, whether intermediate or final, are taxable.

4. It is not necessary to render it taxable that the transaction involve a sale. By the statute as amended, a tax is imposed upon all sales or transfers of shares or certificates of stock, whether operating to convey the beneficial interest in or merely the legal title to said stock, or possession thereof for any pur-

pose. The only exceptions to this rule are those expressly provided for in section 270 of the law.

5. A transfer of voting trust certificates constitutes a transfer of shares of stock within the meaning of the statute and is taxable, as well as the transfer of stock from stockholders to voting trustees.

6. The mere surrender of a certificate of stock for re-issue in smaller denomination is not taxable; but if re-issued in part to the original owner and in part to a third party it is taxable to the extent of the transfer to the third party.

7. Likewise the mere surrender of a certificate of stock held by a deceased person for issuance in the name of his executor or administrator is not taxable; but all transfers made by the latter, whether to trustees, legatees or other persons are taxable.

8. The law applies to the stock of foreign as well as domestic corporations and to residents and non-residents alike.

9. While the law has no extra territorial operation, nevertheless, where it appears that the transfer of the stock on the corporate books within this State constitutes an essential step to render the transfer effectual, it subjects it to a tax although in all other respects made without the State.

10. Where the sale or transfer is shown only by the books of the company the stamps must be placed upon such books, and where it is effected by the delivery or transfer of a certificate the stamp must be placed upon the surrendered certificate. In case of an agreement to sell, or where the sale is effected by the delivery of the certificate assigned in blank, there must be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamps shall be affixed. This bill or memorandum with stamp attached must be affixed to the certificate when presented for transfer.

A strict compliance with these requirements will be insisted upon.

11. Every such bill or memorandum of sale, agreement to sell or sales ticket must show the date thereof, the name of the seller, the amount of the sale and the matter or thing to which it refers, and all such memorandum of sale or sales ticket not used for the purpose of transfer must be kept by the broker for six months from their respective dates.

12. All persons liable for the payment of the tax and all persons acting as agents or brokers for any such person, who in any manner assist in consummating a sale or transfer without paying the required tax are guilty of a misdemeanor and liable to severe penalties.

13. Likewise persons acting as transfer agents are forbidden by the statute to transfer stock on the books of the company until the required tax has been paid; and for a failure to perform this duty they are guilty of a misdemeanor and liable to severe penalties.

14. Every stamp used to denote the payment of the tax must be cancelled by the user by writing or stamping thereon the initials of his name and the date upon which the stamp is attached or used. He must also cut or perforate the stamp in

a substantial manner so that it cannot again be used. A failure so to do renders the party guilty of a misdemeanor and liable to severe penalties.

15. Every broker and every corporation making a sale of shares or certificates of stock is required to keep a just and true book of account setting forth the date of the sale or transfer, and every transaction relating thereto, including the number of shares involved, the total amount covered thereby, and the name of the party to whom the sale or transfer is made. This book shall at all times between the hours of 10 a. m. and 3 p. m. (Saturday, Sunday and legal holidays excepted) be subject to examination by the Comptroller or any of his representatives. A failure to comply with these provisions will subject the offender to severe penalties.

16. Every company is required to keep a transfer register, ledger or stock certificate book containing a full and true record of all sales or transfers of its stock. It is also required to retain and keep all surrendered and cancelled shares or certificates of stock and all memoranda relating thereto, all of which are subject to examination by the Comptroller or any of his representatives between the hours of 10 a. m. and 3 p. m. (Saturdays, Sundays and legal holidays excepted). A failure to comply with this provision will subject the offender to severe penalties.

17. Severe penalties, civil and criminal, are provided by the act for the illegal sale or use of stamps, for the failure to pay the tax imposed and for violation of the other provisions thereof.

18. Furthermore, the failure to pay the tax constitutes an absolute defense to an action brought to recover the purchase price of the stock.

GENERAL CORPORATION LAW

Laws of 1909, Chapter 28, Entitled: "An Act Relating to Corporations Generally, Constituting Chapter Twenty-three of the Consolidated Laws," as Amended to the Commencement of the Legislative Session of 1912.

CHAPTER 23 OF THE CONSOLIDATED LAWS

General Corporation Law

- Article 1. Short title; classification; definitions (§§ 1-3).
2. General provisions (§§ 4-44).
 3. Change of name (§§ 60-65).
 4. Sale of corporate real property (§§ 70-76).
 5. Judicial supervision of corporation and of the officers and members thereof (§§ 90-92).
- *Section 6. Action for sequestration, action for dissolution and action to enforce individual liability of officers and members of corporation (§§ 100-115).
7. Action to annul corporation (§§ 130-136).
 8. Action to dissolve moneyed corporation (§§ 150-161).
 9. Proceedings for voluntary dissolution of corporation (§§ 170-195).
 10. Dissolution of stock corporation without judicial proceedings (§§ 220, 221).
 - 10-a. Provisions applicable to temporary and permanent receivers of corporations (§§ 226, 227).
 11. Powers, duties and liabilities of receivers of corporation (§§ 230-278).
 12. Provisions applicable to two or more of the foregoing proceedings or actions (§§ 300-316).
 13. Alteration and repeal of charter of corporation (§§ 320, 321).
 14. Laws repealed; construction; when to take effect (§§ 330-332).

* So in original.

ARTICLE I

Short Title; Classification; Definitions

- Section 1. Short title.
2. Classification of corporations.
3. Definition.

§ 1. **Short title.** This chapter shall be known as the "General Corporation Law."

Neither the General Corporation Law nor the Stock Corporation Law contains the provisions for the formation of corporations. The General Corporation Law embodies the general provisions which are applicable to corporations of every kind organized under the laws of the State of New York, whether stock or non-stock corporations, unless specific exceptions are made. The commissioners of statutory revision found in each of the numerous laws for the creation and regulation of different classes of corporations many provisions common to all, which, being almost identical in phraseology, served to make the statutes of which they were component parts cumbersome and unwieldy without apparently serving any good purpose. To illustrate: Each act authorizing the organization of new corporations provided the same method of filing and recording certificates, an unvarying reproduction of the general powers contained in the Revised Statutes, and other matters in the line of uniform corporate legislation. Pursuant to the plan of the revisers, these provisions, so frequently re-enacted in different corporation acts and applicable to all corporations, except as stated, were consolidated and grouped into one general act, entitled the General Corporation Law, the full text of which appears on these pages. The Stock Corporation Law, comprising the provisions common to stock corporations only, is the result of the same method of generalization, so that in the several laws authorizing the formation of various kinds of corporations having capital stock, to wit: The Railroad Law, the Banking Law, the Insurance Law, the Transportation Corporations Law (telegraph, gas and electric light, waterworks, pipe-line, navigation, etc., corporations) and the Business Corporations Law, only those matters have been inserted which are peculiar to the particular class provided for, all other provisions applicable to corporations formed under either of said laws being found in the General Corporation Law and the Stock Corporation Law. The plan thus adopted was adhered to by the commissioners of statutory consolidation in 1909.

The provisions of the General Corporation Law and the Stock Corporation Law are also applicable to corporation heretofore organized under either of the general laws for the formation of corporations which were repealed in 1890 and 1892, as well as to corporations organized under special acts.

§ 2. **Classification of corporations.** A corporation shall be either,

1. A municipal corporation,
2. A stock corporation, or
3. A non-stock corporation.

A stock corporation shall be either,

1. A moneyed corporation,
2. A railroad or other transportation corporation, or
3. A business corporation.

A non-stock corporation shall be either,

1. A religious corporation,
2. A membership corporation, or
3. Any corporation other than a stock corporation.

A reference in a general law to a class of corporations described in accordance with this classification shall include all corporations theretofore formed belonging to such class.

Formerly § 2, as added by L. 1892, ch. 687.

§ 3. **Definitions.** 1. A "municipal corporation" includes a county, town, school district, village and city and any other territorial division of the state established by law with powers of local government.

2. A "stock corporation" is a corporation having a capital stock divided into shares, and which is authorized by law to distribute to the holders thereof dividends or shares of the surplus profits of the corporation. A corporation is not a stock corporation because of having issued certificates called certificates of stock, but which are in fact merely certificates of membership, and which is not authorized by law to distribute to its members any dividends or share of profits arising from the operations of the corporation.

3. The term "non-stock corporation" includes every corporation other than a stock corporation.

4. A "moneyed corporation" is a corporation formed under or subject to the banking or the insurance law.

5. A "domestic corporation" is a corporation incorporated by or under the laws of the state or colony of New York. Every corporation which is not a domestic corporation is a foreign corporation, except as provided by the code of civil procedure for the purpose of construing such code.

6. The term "directors," when used in relation to corporations, shall include trustees or other persons, by whatever name known, duly appointed or designated to manage the affairs of the corporation.

7. The term "certificate of incorporation" shall include articles of association or any other written instruments required by law to be filed, to effect the incorporation of a corporation, including a certified copy of an original certificate of incorporation filed for such purpose in pursuance of law.

8. The term "member of a corporation" shall include every person having a right to vote at a meeting of the corporation for the election of directors, other than a person having a right to vote only upon a proxy.

9. The term "office of a corporation" means its principal office within the state, or principal place of business within the state if it has no principal office therein.

10. The term "business of a corporation," when used with reference to a non-stock corporation, includes the operations for the conduct of which it is incorporated.

11. The term "corporate law" or "laws," when used in any law forming a part of the consolidation of the general laws of the state of which this chapter is a part, means the general statutes of this state relating to corporations included in such consolidation.

Formerly L. 1890, ch. 563, § 2, as am'd by L. 1892, ch. 687; L. 1895, ch. 672.

Definition of Terms.

Paragraph 6, in relation to directors and trustees, appears to be merely a definition of terms, and to make the word "directors," when used in these laws, applicable to corporations in which the members of the managing board are termed trustees, governors, trustees, etc.

Principal Office.

Laws of 1895, ch. 672, amending this section, eliminated from paragraph 9, a provision which read as follows: "The office of a stock corporation shall be in the county, town or city in which its business is principally carried on."

Under the foregoing section the terms "principal office" and "principal place of business" are synonymous when used in respect to corporations organized under the laws of this State. *Peo. ex rel. Knickerbocker Press v. Barker*, 87 Hun 341, *affd.*, 147 N. Y. 715.

A corporation is deemed a resident of the county where its principal business office is located. *Conroe v. Nat'l Pro. Ins. Co.*, 10 How. Pr. 405; *Rossie Iron Works v. Westbrook*, 36 St. Rep. 555.

The designation, in the certificate of incorporation, of the location of the principal office is conclusive as to the taxation of the personal property of a corporation. *Union Steamboat Co. v. Buffalo*, 82 N. Y. 351; *Western Transp. Co. v. Scheu*, 19 N. Y. 408; *Oswego Starch Factory v. Dolloway*, 21 N. Y. 449. In the *Union Steamboat Co.* case, *supra*, the business of the corporation was the transportation of freight and passengers on the great lakes, all the other business of the company being conducted at the city of Buffalo, except the annual meetings, which were held in Rockland county, and it was urged, therefore, that the purpose for which the principal office of the plaintiff was located in the county of Rockland was to avoid taxation. The court held that to be immaterial, that it had nothing to do with the motive, and could deal only with the fact, and that if such an evil existed, another authority must provide for its correction.

The Charter.

A corporation is purely artificial, having no natural power, but only such as its charter confers. The charter of a corporation formed under general laws is the statute under which it was organized. Upon filing the certificate of incorporation it comes into existence with power to do only that which is expressly or impliedly authorized by statute. *People v. Ballard*, 134 N. Y. 269.

Application of Corporate Laws.

For general provisions applicable to all stock corporations, see the Stock Corporation Law.

For provision specially applicable to business corporations, and for the formation thereof, see the Business Corporations Law.

For provisions applicable to foreign corporations reference should be had to the index under the heading "Foreign Corporations."

Other Corporate Laws.

For provisions respecting the formation of, and specially applicable to, railroad corporations, ferry corporations, stage-coach corporations, tramway corporations, pipe-line corporations, gas and electric light corporations, waterworks corporations, telegraph and telephone corporations, navigation corporations, turnpike, plankroad and bridge corporations, see the current edition of "White on Corporations."

For provisions regulating the formation of, and specially applicable to, railroad corporations, see the Railroad Law and the Public Service Commissions Law in the current edition of "White on Corporations."

ARTICLE 2**General Provisions**

- Section 4. Qualifications of incorporators.
5. Filing and recording certificates of incorporation.
6. Corporate names.
7. Amended and supplemental certificates.
8. Lost or destroyed certificates.
9. Certificate and other papers as evidence; evidence of consolidation.
10. Limitation of powers; provisions of certificate.
11. Grant of general powers.
12. Enlargement of limitations upon the amount of the property of non-stock corporations.
13. Acquisition of additional real property.
14. Acquisition of property without the State.
15. Certificate of authority of a foreign corporation.
16. Proof to be filed before granting certificate.
17. Reincorporation of foreign moneyed corporations.
18. Papers to be filed upon reincorporation.
19. When reincorporation effective and effect thereof.
20. Acquisition of real property in this State by certain foreign corporations.
21. Acquisition by foreign corporations of real property in this State.
22. Prohibition of banking powers.
23. Qualification of members as voters.
24. Cumulative voting.
25. Voting trust agreements.
26. Proxies.
27. Challenges.
28. Effect of failure to elect directors.
29. Mode of calling special election of directors.
30. Mode of conducting special election of directors.
31. Qualification of voters and canvass of votes at special election.

32. Powers of supreme court respecting elections.
33. Stay of proceedings in actions collusively brought.
34. Quorum of directors and powers of majority.
35. Directors as trustees in case of dissolution.
36. Forfeiture for non-user.
37. Extension of corporate existence.
38. Revival of corporate existence.
39. Approval of certificates of extension or revival; when required.
40. Extension when stock is owned by another corporation.
41. Effect of extension.
42. When notice of lapse of time unnecessary.
43. As to acts of directors.
44. Political contributions prohibited; penalty.

§ 4. Qualifications of incorporators. A certificate of incorporation must be executed by natural persons, who must be of full age, and at least two-thirds of them must be citizens of the United States and one of them a resident of this state. This section shall not apply to a corporation formed by the reincorporation or consolidation of existing corporations, or to the reorganization of a corporation upon the sale of the property and franchises of a previously existing corporation or otherwise.

Formerly § 4, added by L. 1892, ch. 687, as am'd by L. 1895, ch. 672.

The terms of the foregoing section preclude corporations, partnerships and minors from acting as incorporators. It also prevents the formation of corporations by persons acting in a representative capacity.

An incorporator has no power, in his capacity as notary public, to take the acknowledgment of another incorporator to the certificate of incorporation, and an acknowledgment so taken is a nullity. *Peo. ex rel. Erie R. R. Co. v. Bd. of R. R. Comrs.*, 105 App. Div. 273.

Each member of a firm, engaged under the firm name in organizing a corporation, is liable for the misrepresentations and concealments of the others, committed in promoting the enterprise. *Walker v. Anglo-Am. M. & T. Co.*, 72 Hun 334.

Persons engaged in organizing a corporation, who induce others to subscribe for stock, by issuing statements, are liable for damages if they make material misrepresentations, or conceal material facts, to the injury of those whom they induce to subscribe, and this liability extends to all who are induced by their agents to subscribe for shares. *Walker v. Anglo-Am. M. & T. Co.*, 72 Hun 334; *Brewster v. Hatch*, 122 N. Y. 349; *Morgan v. Skiddy*, 62 N. Y. 319; *Getty v. Devlin*, 54 N. Y. 403; 70 N. Y. 504.

Married Women May be Incorporators.

Married women who are qualified as to age and citizenship, as well as single women, may act as incorporators. *Peo. v. Webster*, 10 Wendell 554. Another ruling in this case to the effect that when a married woman sues, or is sued, her husband must be joined with her, has been superseded by L. 1884, ch. 381 (now Domestic Relations Law, § 51). The full text of said section is as follows:

§ 51. Powers of married woman.—A married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person, including her husband, and to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts, and be liable on such contracts, as if she were unmarried; but a husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife. All sums that may be recovered in actions or special proceedings by a married woman to recover damages to her person, estate or character shall be the separate property of the wife. Judgment for or against a married woman may be rendered and enforced, in a court of record, or not of record, as if she was single. A married woman may confess a judgment specified in section one thousand two hundred and seventy-three of the code of civil procedure. Formerly L. 1884, ch. 381, as re-enacted and am'd by Domestic Relations Law of 1896, ch. 272, § 21; re-enacted by L. 1909, ch. 19, § 51.

Since ch. 381, L. 1884 (now Domestic Relations Law, § 51) was enacted all disabilities of a married woman to make valid contracts are removed, and she may now make contracts and bind herself in the same way as a femme sole. Where such a contract is made she is no longer to be considered as acting as the agent of her husband. *O'Connell v. Shera*, 66 App. Div. 467.

§ 5. Filing and recording certificates of incorporation.

1. Every certificate of incorporation including the corporate name or title and every amended or supplemental certificate, and every certificate which alters the provisions of any certificate of incorporation or any amended or supplemental certificate hereafter executed, shall be in the English language, and except as otherwise provided by law, shall be filed in the office of the secretary of state, and shall be by him duly recorded and indexed in books specially provided therefor, and a certified copy of such certificate or amended or supplemental certificate

with a certificate of the secretary of state of such filing and record, or a duplicate original of such certificate or amended or supplemental certificate shall be filed and similarly recorded and indexed in the office of the clerk of the county in which the office of the corporation is to be located, or, if it be a non-stock corporation, and such county be not determined upon at the time of executing the certificate of incorporation, in such county clerk's office as the judge approving the certificate shall direct. All taxes required by law to be paid before or upon incorporation and the fees for filing and recording such certificate must be paid before filing. No corporation shall exercise any corporate powers or privileges until such taxes and fees have been paid.

2. Whenever under any law now or heretofore in force the certificate of incorporation of any corporation other than a stock corporation was or is required to be filed in more than one public office, a certified copy of such certificate so filed in any one of such public offices may be filed in such other office with the like effect as if the original had been duly filed therein, provided, however, that no rights accrued prior to the filing of such copy shall be impaired or affected thereby, provided also, that such filing of a copy shall not cause a duplication or similarity of corporate names in violation of the next succeeding section.

Formerly § 3, L. 1890, ch. 563, as am'd by L. 1892, ch. 687; L. 1895, ch. 672; L. 1902, ch. 285.

By an amendment of 1895, ch. 672, the provision was inserted requiring certificates to be in the English language. The words, "including the corporate name or title," were inserted by L. 1902, ch. 285.

Under the above section an original certificate must be filed in the office of the Secretary of State, and either a certified copy thereof or a duplicate original in the office of the county clerk.

Acknowledgment.

One who is himself an incorporator may not take the acknowledgments of other incorporators. *Peo. ex rel. Erie R. R. v. Railroad Comrs.*, 105 App. Div. 273.

The acknowledgment may be taken before any officer authorized to take the acknowledgment or proof of the execution of a deed of real property to entitle it to be recorded in a county clerk's office, and shall be made and certified in the same manner as such acknowledgment or proof of such deed. Gen. Construction L. § 11.

The Secretary of State does not require a county clerk's certificate authenticating the act of a notary public or other officer taking an acknowledgment within the State of the execution of a corporation certificate to be filed in his office but where an acknowledgment is taken in one county and the duplicate original certificate is to be filed in the office of the clerk of another county, it is necessary to obtain a certificate of the clerk of the county in which the acknowledgment is taken authenticating the act of the officer taking such acknowledgment. Real Property L. § 310.

Organization Tax; Filing and Recording Fees.

The act relative to the tax payable to the State Treasurer for the privilege of organization and for increasing the capital stock of corporations, the statutes prescribing the fees payable to the office of the Secretary of State and to county clerks, and tables respecting the same appear on pages 31-45 ante.

Right to File.

In case the Secretary of State refuses to file a certificate the remedy is by mandamus. *Peo. ex rel. N. Y. Phonograph Co. v. Rice*, 128 N. Y. 591, affg. 57 Hun 486; *Peo. ex rel. Eichemeyer-Field Co. v. Rice*, 66 Hun 130, affd., 138 N. Y. 614; *id.*, 51 St. Rep. 93.

The Secretary of State has a right to pass upon the form of the certificate, and as to whether or not it is entitled to be filed, subject to review in a proper proceeding. He is not required to file a certificate unauthorized by the act. The right to file a certificate, by which a body politic and corporate is to be ipso facto created, only exists in behalf of those who bring themselves within the terms of the act. *Peo. ex rel. Blossom v. Nelson*, 46 N. Y. 477; *Peo. ex rel. Davenport v. Rice*, 68 Hun 24; *id.*, 22 N. Y. Supp. 631; *id.*, 52 St. Rep. 50.

A motion for a mandamus to compel the Secretary of State to file a certificate can only be made in the third judicial district, or in a county adjoining thereto. *Mason v. Willers*, 7 Hun 23; *Peo. ex rel. Cagger v. Supervisors*, 2 Abb. N. S. 78. See also 68 Hun 24.

A mandamus will not issue to compel the filing of a certificate containing a clause which contravenes the provisions of the statute. *Peo. ex rel. Barney v. Whalen*, 56 Misc. 278, affd., 119 App. Div. 749, and 189 N. Y. 560.

The Secretary of State will not be compelled to file the certificate of incorporation of a company to be formed as a social organization when its purposes are in reality those of a business corporation. *Peo. ex rel. Davenport v. Rice*, supra.

To restrain the Secretary of State or county clerk from filing a certificate, the proceedings should be by injunction. An injunction against the Secretary of State can only be granted by the Supreme Court at a term held in the third judicial department. Code of Civil Pro. § 605, post; *Matter of Comstock*, 25 St. Rep. 611.

Where a peremptory mandamus is applied for, which by its terms acts as a restraint upon State officers engaged in, or about to perform a statutory duty, and it is to be used as an injunction, the limitation upon the granting of such an injunction by section 605 of the Code of Civil Procedure applies; that is, it "shall not be granted, except by the Supreme Court at a term thereof, sitting in the department in which the officer or board is located, or the duty required to be performed." *Peo. ex rel. Derby v. Rice*, 129 N. Y. 461.

Effect of Filing.

The filing of the certificate in the office of the Secretary of State is sufficient to effect incorporation; and an omission to file the duplicate in the office of the county clerk would not vitiate the incorporation so as to render the members partners as between themselves. *Raisbeck v. Oesterricher*, 4 Abb. N. C. 444. See, also, *Meriden Tool Co. v. Morgan*, 1 Abb. N. C. 125, note; *Western Transportation Co. v. Scheu*, 19 N. Y. 408; *Oswego Starch Factory v. Dolloway*, 21 N. Y. 449; *Union Steamboat Co. v. City of Buffalo*, 82 N. Y. 351; *Jessup v. Carnegie*, 80 N. Y. 441; *Eaton v. Aspinwall*, 19 N. Y. 121, affg. 3 Abb. Pr. 417; *Childs v. Smith*, 46 N. Y. 34.

§ 6. Corporate names. 1. No certificate of incorporation of a proposed corporation having the same name as a corporation authorized to do business under the laws of this state, or a name so nearly resembling it as to be calculated to deceive, shall be filed or recorded in any office for the purpose of effecting its incorporation, or of authorizing it to do business in this state; nor shall any corporation except a religious, charitable or benevolent corporation be authorized to do business in this state unless its name has such word or words, abbreviation, affix or prefix, therein or thereto, as will clearly indicate that it is a corporation as distinguished from a natural person, firm or copartnership; or unless such corporation uses with its corporate name, in this state, such an affix or prefix. A corporation formed by the reincorporation, reorganization or consolidation of other corporations or

upon the sale of the property or franchises of a corporation, may have the same name as the corporation or one of the corporations to whose franchises it has succeeded. No corporation shall be hereafter organized under the laws of this state with the word "trust," "bank," "banking," "insurance," "assurance," "indemnity," "guarantee," "guaranty," "title," "savings," "investment," "loan" or "benefit" as part of its name, except a corporation formed under the banking law or the insurance law.

2. No corporation, society or association, whether now existing or hereafter organized under or by virtue of the laws of this state, shall ever employ the words "Lucretia Mott" to designate, describe or name any hospital, infirmary or dispensary, or any part thereof, or any similar institution.

Formerly § 4, L. 1890, ch. 563, as am'd by L. 1892, ch. 687, § 6; L. 1895, ch. 672; L. 1900, ch. 704; L. 1902, ch. 9; L. 1907, ch. 115.

Thus amended by L. 1911, ch. 638. This amendment, to take effect Jan. 1, 1912, inserted the new requirement that the name must indicate that it is a corporation.

For provisions relative to change of corporate name, see §§ 60-65, post.

Change Made by Statute.

Formerly a domestic corporation could be formed with a name resembling that of a foreign corporation, and a foreign corporation was permitted to obtain a certificate of authority to do business within the State, even though its name conflicted with that of another foreign corporation previously authorized to do business in the State, but the amendment of 1902, ch. 9, broadens the prohibition so as to prevent both of such infringements upon the name of any foreign corporation that had theretofore received a certificate of authority.

University or College.

Provisions restricting the use by corporations of the name "university" or "college" are contained in the Education Law, § 1104 (L. 1909, ch. 21), as follows: "No individual, association or corporation not holding university or college degree-conferring powers by special charter from the Legislature of this state or from the regents, shall confer any degrees, or shall transact business under or in any way assume the name university or college, till it shall have received from the regents, under their seal, written permission to use such name, and no such permission shall be granted by the regents, except on favorable report after personal inspection of the

institution by an officer of the university. * * * Violation of this section shall be a misdemeanor. * * * This provision was formerly in section 33 of the University Law (L. 1892, ch. 378).

Discretion of Secretary of State.

The Secretary of State must decide in the first instance whether the proposed name is, or is not, within the statutory prohibition. *State v. McGrath*, 5 S. W. Rep. 29; *Peo. ex rel. Columbia Chem. Co. v. O'Brien*, 101 App. Div. 296.

Corporate Name, Using Abbreviation.

A corporation must use its corporate name in the transaction of its business and a contract, signed with a fragment of its entire corporate name, is not well executed; and a check, drawn to a payee designated by a like fragment of the corporate name, is insufficient to form the basis of a recovery in an action by the corporation against the drawer. *Scarsdale Pubg. Co. v. Carter*, 63 Misc. 271.

Names Claimed to be Infringed.

The name "Buffalo Commercial Bank" does not infringe upon "Bank of Commerce in Buffalo." *In re Bank of Attica*, 35 St. Rep. 708, 12 N. Y. Supp. 648.

The name "The Columbian Chemical Company" is an infringement of the name "Columbia Chemical Company." *Peo. ex rel. Columbia Chemical Co. v. O'Brien*, 101 App. Div. 296.

"The S. Howes Co.," engaged in manufacturing grain cleaners, is entitled to enjoin "The Howes Grain Cleaner Co." from using the name "Howes." *The S. Howes Co. v. Howes Grain Cleaner Co.*, 24 Misc. 83, and cases therein cited; s. c., 19 App. Div. 625.

The use of the trade-mark, "The Little Antique Shop," is an infringement upon the name, "The Little Shop." *Crawford v. Laus*, 29 Misc. 248.

The name "The Tuerk Water Meter Company" is an infringement of the name "The Tuerk Water Motor Company." *Tuerk Hydraulic Power Co. v. Tuerk*, 92 Hun 65.

The Salvation Army of the United States which publishes a paper called the "War Cry," cannot maintain an action against the American Salvation Army to restrain it from using its name and from publishing a paper under the name of "The American Salvation Army War Cry." *The Salvation Army in the U. S. v. American S. A.*, 62 Misc. 360.

A corporation which has for years used the corporate title "Roy Watch Case Co." is entitled to enjoin a rival and lately constituted corporation from employing the name "Camm-Roy Watch Case Co." *Roy Watch Case Co. v. Camm-Roy Watch Case Co.*, 28 Misc. 45.

Where a foreign corporation does business within the State without complying with the statutes, and a domestic corporation, subsequently organized, innocently adopts the same name the latter will not be restrained from using it. *American Tartar Co. v. American Tartar Co.*, 57 App. Div. 411.

At the suit of "The Legal Aid Society," a benevolent association, the court temporarily restrained the "Co-operative Legal Aid Society," a business concern. *Legal Aid Soc. v. Co-operative Legal Aid Soc.*, 41 Misc. 127.

Corporate Name as Property Right.

A corporation has an absolute legal right to reincorporate under the corporate name adopted by it under its original incorporation though it resembles that of an existing corporation. *Peo. ex rel. U. S. Grand Lodge of Order of Brith Abraham v. Payne*, 161 N. Y. 229.

The right to the exclusive use of a name will be protected upon the same principle that persons are protected in the use of trademarks. *State v. McGrath*, 5 S. W. Rep. 29.

It is unnecessary to determine that there is intent to do wrong. The right to protection of name is based upon the proprietary right acquired by the use thereof. *Am. Grocer Pubg. Ass'n. v. Grocer Pubg. Co.*, 25 Hun 398. See, also, *Commercial Union Assur. Co. v. Smith*, 18 St. Rep. 151, 2 N. Y. Supp. 296; *Matter of U. S. Mer. R. & Col. Assn.*, 22 St. Rep. 494, 115 N. Y. 176; *Railway Age Pubg. Co. v. Garnett*, 17 Weekly Dig. 250; *Farmers' Loan & Trust Co. v. Farmers' Loan & Trust Co. of Kansas*, 21 Abb. N. C. 104; *Hygeia Water Ice Co. v. N. Y. Hygeia Ice Co. (Ltd.)*, 19 N. Y. Supp. 602, 47 St. Rep. 71, *affd.*, 140 N. Y. 94; *Employers' Liability Assurance Corporation v. Employers' Liability Ins. Co.*, 61 Hun 552; *In re Bank of Attica*, 12 N. Y. Supp. 648, 35 St. Rep. 708; *Amoskeag Mfg. Co. v. Garner*, 54 How. Pr. 297.

§ 7. Amended and supplemental certificates. If in the original or amended certificate of incorporation of any corporation, or if in a supplemental certificate of any corporation any informality exist, or if any such certificate contain any matter not authorized by law to be stated therein, or if the proof or acknowledgment thereof shall be defective, the corporators or directors of the corporation may make and file an amended certificate correcting such informality or defect or striking out such unauthorized matter; and the certificate amended shall be deemed to be amended accordingly as of the date such amended certificate was filed, and upon the filing of such an amended certificate of incorporation, the corporation shall then for all purposes be deemed to be a corporation from the time of filing the original certificate.

The supreme court may, upon due cause shown, and

proof made, and upon notice to the attorney-general, and to such other persons as the court may direct, and upon such terms and conditions as it may impose, amend any certificate of incorporation which fails to express the true object and purpose of the corporation, so as to truly set forth such object and purpose.

When an amended or supplemental certificate is filed, an entry shall be made upon the margin of the index and record of the original certificate of the date and place of record of every such amended certificate.

The amendment of a certificate under this section shall be without prejudice to any pending action or proceeding, or to any rights previously accrued.

Formerly L. 1890, ch. 563, § 5, as am'd by L. 1892, ch. 687, § 7.

For forms of papers under the foregoing section, see post, forms Nos. 16-19.

For provisions authorizing alteration or extension of purposes or powers see Stock Corp. Law, § 18.

Scope of Section.

Under chapter 135, Laws of 1870, now repealed, it was held that the act was intended to enable corporations to remedy patent omissions, that is, the omission of things which are required to be stated, and which, being omitted, make the certificate imperfect upon its face. *Matter of N. Y., L. E. & W. R. R. Co.*, 25 Hun 556. Section 7 above, however, is much broader and more liberal in its terms, and seems to permit the correction of the specified irregularities, whether they are patent upon the face of the certificate or not.

§ 8. Lost or destroyed certificates. If either of the certificates of incorporation shall be lost or destroyed after filing, a certified copy of the other certificate may be filed in the place of the one so lost or destroyed and as of the date of its original filing, and such certified copy shall have the same force and effect as the original certificate had when filed.

Formerly L. 1890, ch. 563 § 6, as am'd by L. 1892, ch. 687, § 8.

§ 9. Certificate and other papers as evidence; evidence of consolidation. 1. The certificate of incorporation of any corporation duly filed shall be presumptive evidence

of its incorporation, and any amended certificate or other paper duly filed or recorded relating to the incorporation of any corporation or its existence or management, and containing facts required or authorized by law to be stated therein, shall be presumptive evidence of the existence of such facts.

2. Whenever, by the laws of any other state or territory, or the dominion of Canada, a copy of the certificate of organization or incorporation or any other certificate, certified or exemplified by any officer or officers in such state or territory or dominion, is or shall be *prima facie* evidence of the due formation, creation, existence, organization or capacity of any corporation or joint-stock company, created, organized or located in such state, territory or dominion, or claiming so to be, such certificate or certificates, duly exemplified, or a duly exemplified copy thereof, shall be received in all actions and proceedings in this state, in or before all courts and officers, with the same force and effect in all respects as *prima facie* evidence as aforesaid, as in such other state, territory or dominion.

3. Where two or more corporations have been or shall hereafter be consolidated and merged into a new corporation, a certificate of the secretary of state under his official seal concisely stating the names of the respective corporations consolidated, the dates of the filing of the certificates respectively of the incorporation of such corporations in his office, the object for which they were formed, including the nature and locality of their business as set forth in their respective incorporation papers on file in his office, the date of the filing of the consolidation agreement and other proceedings in his office, the name of the new corporation formed by such consolidation and merger, the term of its corporate existence, the place where its principal office is situated and the amount

of its capital stock, shall be presumptive and prima facie evidence in all actions and special proceedings for all purposes of the incorporation of the corporations so consolidated, the incorporation of the new corporation by such consolidation and merger from the date of filing of said consolidation agreement and proceedings, and of the other facts so certified by him.

Subd. 1 was formerly L. 1890, ch. 563, § 7, as am'd by L. 1892, ch. 687, § 9; L. 1895, ch. 672. Subd. 2 was formerly L. 1877, ch. 311. Subd. 3 was formerly L. 1899, ch. 201.

Certified Copies

This section is in addition to, and does not repeal or supersede section 933 of the Code, which provides that a duly certified copy of a paper filed in a public office is evidence as though the original were produced.

§ 10. Limitation of powers; provisions of certificate.

1. No corporation shall possess or exercise any corporate powers not given by law, or not necessary to the exercise of the powers so given.

2. The certificate of incorporation of any corporation may contain any provision for the regulation of the business and the conduct of the affairs of the corporation, and any limitation upon its powers, or upon the powers of its directors and stockholders, which does not exempt them from the performance of any obligation or the performance of any duty imposed by law.

Formerly L. 1890, ch. 563, § 9, as am'd by L. 1892, ch. 687, § 10; L. 1895, ch. 672.

The amendment of 1895, which took effect May 14, changed the head note of this section and added the last sentence, which embraces provisions that were duplicated in former section 2 of the Business Corporations Law, but were omitted from that law in 1909 in order to avoid such duplication.

For example of restriction of voting powers, see Form No. 3.

The certificate of incorporation may classify the stock into common and preferred, and may provide that the preferred stockholders shall be deprived of voting power, upon questions relating to the management, in consideration of the preferences over the common stock which is given them. Such a provision is but an arrangement between two classes of stockholders, which does not concern the public, and does not violate any rule of the common law or any rule of public policy. *Peo. ex rel. Browne v. Koenig*, 133 App. Div. 756.

Interpretation of Corporate Powers.

A provision in a certificate of incorporation, that the directors may, with the consent of holders of two-thirds of the capital stock, sell, assign, transfer or otherwise dispose of the whole property of the corporation, not including franchises, to any person or corporation, domestic or foreign, is not authorized by law, nor can it be justified as a provision regulating the business relating to the conduct of the affairs of the corporation. It is contrary to section 33 (now 16) of the Stock Corp. Law. *Peo. ex rel. Barney v. Whalen*, 119 App. Div. 749, *affd.*, 189 N. Y. 560.

A corporation possesses not only powers specifically granted in terms by its charter, but also such powers as shall be necessary to the exercise of the powers so enumerated and given. *Peo. ex rel. Tiffany v. Campbell*, 144 N. Y. 166. It has not, however, implied powers which are merely convenient or useful and not essential to its business. *Id.*

A clause in a certificate of incorporation which provides that the number of directors shall not be changed except by the unanimous consent of all the stockholders is a valid and binding limitation upon the powers of the stockholders and authorized by section 10 of the General Corporation Law. *Ripin v. United States Woven Label Co.*, 71 Misc. 510.

Unless restrained by law, every corporation has the incidental power to make any contract necessary to advance the objects for which it was created. *Legrand v. Manhattan Mer. Assn.*, 80 N. Y. 638.

A corporation, in order to attain its legitimate objects, may deal precisely as an individual may, who seeks to accomplish the same ends. *Barry v. Merchants' Exchange Co.*, 1 Sandf. Chan. 289; *Saford v. Wycoff*, 4 Hill 422; *Koehler & Co. v. Reinheimer*, 26 App. Div. 1.

A corporation has no power to indorse a note for the accommodation of the maker. *A. D. Farmer & Son Type Founding Co. v. Humboldt Pub. Co.*, 27 Misc. 314; *Nat. Park Bk. v. G. A. M. W. & S.*, 116 N. Y. 281. But where one corporation indorses the note of another of which it owns the entire capital stock the indorsement is a guaranty based upon a valuable consideration and valid. *In re New York Wheel Works*, 141 Fed. 430.

One dealing with a corporation is chargeable with notice of its powers and the purposes for which it was formed, and is bound to know the extent of the power and authority of its agents or officers. A corporation necessarily carries its charter wherever it goes, for that is the law of its existence. *Jemison v. Citizens' Savings Bk.*, 122 N. Y. 140; *Alexander v. Caulwell*, 83 N. Y. 480, *see also*, *Patterson v. Robinson et al.*, 116 N. Y. 193; *Wilson v. Kings Co. El. R. R. Co.*, 114 N. Y. 491; *Martin v. N. F. P. Co.*, 122 N. Y. 165; *Wahlig v. S. P. M. Co.* 25 St. Rep. 864.

§ 11. Grant of general powers. Every corporation as such has power, though not specified in the law under which it is incorporated:

1. To have succession for the period specified in its certificate of incorporation or by law, and perpetually when no period is specified.

2. To have a common seal, and alter the same at pleasure.

3. To acquire by grant, gift, purchase, devise or bequest, to hold and to dispose of such property as the purposes of the corporation shall require, subject to such limitations as may be prescribed by law.

4. To appoint such officers and agents as its business shall require, and to fix their compensation, and

5. To make by-laws, not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and the transfer of its stock, if it has any, and the calling of meetings of its members. Such by-laws may also fix the amount of stock, which must be represented at meetings of the stockholders in order to constitute a quorum, unless otherwise provided by law. By-laws duly adopted at a meeting of the members of the corporation shall control the action of its directors. No by-law adopted by the board of directors regulating the election of directors or officers shall be valid unless published for at least once a week for two successive weeks in a newspaper in the county where the election is to be held, and at least thirty days before such election. Subdivisions four and five of this section shall not apply to municipal corporations.

Formerly L. 1890, ch. 563, § 8, as am'd by L. 1892, ch. 687, § 11; L. 1895, ch. 672.

For form of by-laws, see post, Form No. 5.

In 1895 the words "and the calling of meetings of its members" were inserted in the first sentence of subdivision 5, and also the words "adopted by the board of directors" in the last sentence but one.

Corporate Existence.

1. The term of existence may be extended. See § 37, post.

It would seem that the filing of the certificate of incorporation in the office of the Secretary of State is sufficient to effect incorpora-

tion and an omission to file the duplicate in the office of the county clerk would not vitiate the incorporation. *Raisbeck v. Oesterricher*, 4 Abb. N. C. 444; compare *Card v. Moore*, 68 App. Div. 327, *affd.*, 173 N. Y. 598.

The regularity of corporate existence cannot be collaterally attacked. *Smith v. Havens Relief Fund Society*, 118 App. Div. 678, *affd.*, 190 N. Y. 557.

Corporate Seal.

2. The corporate seal is not always necessary in order to bind the corporation. It is of great value as showing the acts of the corporation. *Leinkauf v. Calman*, 110 N. Y. 50; *Whitford v. Laidler*, 94 N. Y. 145.

The corporate seal is not necessary to the validity of its contracts. *Valente v. Int. Milling Co.*, 119 App. Div. 127.

The unexplained presence of a corporate seal upon promissory notes of a corporation does not affect their apparent character and require them to be regarded as sealed instruments. *Weeks v. Esler*, 143 N. Y. 374, reviewed in *Chase Nat. Bk. v. Faurot*, 149 N. Y. 532.

The presence of the corporate seal on a document is *prima facie* proof that it was executed by proper authority. *Quackenboss v. Globe & R. F. Ins. Co.*, 177 N. Y. 71; *Gause v. Commonwealth Trust Co.*, 124 App. Div. 438.

An instrument or writing duly executed, in the corporate name of a corporation, which shall not have adopted a corporate seal, by the proper officers of the corporation under their private seals, shall be deemed to have been executed under the corporate seal. General Construction Law, § 45.

Power to Hold Property.

A maximum limit of property that may be held by a non-stock corporation is prescribed in the next succeeding section. No such limit is prescribed for stock corporations.

For limitations as to right to acquire real property see next section.

A corporation although created only for a term of years, may purchase and hold lands in fee. *Nicoll v. N. Y. & Erie R. R. Co.*, 12 N. Y. 121; *Peo. v. O'Brien*, 111 N. Y. 1, 38.

When property or rights have been acquired or become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted. *Albany R. R. Co. v. Brownell*, 24 N. Y. 345; *Peo. v. O'Brien*, 111 N. Y. 1; *id.*, 111 N. Y. 52; *Lord v. Equitable Life Assur. Soc.*, 194 N. Y. 212.

A corporation may take title to all kinds of property, even the stock of another corporation, in the payment of a debt. *H. & G. Man. Co. v. H. & W. Metal Co.*, 38 St. Rep. 157, 127 N. Y. 252.

Though corporate existence may be limited it does not result in inability to acquire unlimited property rights. *Matter of Consolidated Gas Co.*, 56 Misc. 49, *affd.*, 124 App. Div. 401.

A lease executed by a corporation for a longer period than its

corporate life is not invalid nor will it cease upon the termination of such corporate life. *Tate v. Neary*, 52 App. Div. 78.

4. See § 34, post, and Stock Corp. L., §§ 25, 30 and 31.

By-Laws.

Directors may make necessary by-laws, subject, however, to the by-laws duly adopted by the members of the corporation. See § 34, post. The by-laws should fix the time and place of the election of directors. See Stock Corp. Law, §§ 25 and 29, post. The by-laws should prescribe the manner of appointing inspectors of election (Stock Corp. Law, § 31, post), and they should prescribe the manner of transferring stock. *Id.*, § 50, post.

A by-law must be reasonable, and adapted to the purposes of the corporation, or it is void. *Peo. v. Medical Soc.*, 24 Barb. 570; see also *Matthews v. Associated Press*, 136 N. Y. 333; *Compton v. The Chelsea*, 128 N. Y. 537; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159.

The term "existing law" as used in subd. 5, regulating the power to make by-laws refers not only to statutes but to decisions of the court. *Raub v. Gerken*, 127 App. Div. 42.

A by-law which provides that a majority of the stock, present in person or by proxy, at any meeting shall constitute a quorum, is not applicable to elections for directors, as such elections are regulated by the Stock Corporation Law, § 20 (now § 25). *Matter of Rapid Transit Ferry Co.*, 15 App. Div. 530, revsg. in part 19 Misc. 409.

A by-law, enacted under express authority of an act of the Legislature, and in conformity with the power conferred has the same force as if enacted by the Legislature. *Brick Church v. Mayor, etc., of New York*, 5 Cow. 538; *McDermott v. Board of Police*, 5 Abb. Pr. 422; *Timolat v. Held Co.*, 17 Misc. 556.

By-laws of stock corporations are, as to third persons, private regulations binding as between the corporation and its members or third persons having knowledge of them, but of no force as limitations per se as to third persons of an authority which, except for the by-laws, would be construed as within the apparent scope of the agency. *Rathbun v. Snow*, 123 N. Y. 349.

Under subdivision 5 above, daily publication of the by-law is not intended. Publication once a week for two weeks is sufficient. *Wood v. Knapp*, 100 N. Y. 109. It is not necessary that publication should be made on the same day of each week; it is sufficient if made on any day of each week for the requisite number of weeks. *Id.*

Power to Sue.

No provision relative to suits was included in the above section, because contained in the State Constitution, article 8, section 3, as follows: "All corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons."

§ 12. Enlargement of limitations upon the amount of the property of non-stock corporations. If any general or special law heretofore passed, or any certificate of incorporation, shall limit the amount of property a corporation other than a stock corporation may take or hold, such corporation may take and hold property of the value of ten million dollars or less, or the yearly income derived from which shall be one million dollars or less, notwithstanding any such limitations. In computing the value of such property, no increase in value arising otherwise than from improvements made thereon shall be taken into account.

Formerly § 12, added by L. 1892, ch. 687, as am'd by L. 1894, ch. 400; re-enacted by L. 1909, ch. 28, as am'd by L. 1909, ch. 276. Thus am'd by L. 1911, ch. 158.

The foregoing limitations do not affect stock corporations. As to what are classified as stock and non-stock corporations, respectively, see §§ 2 and 3, ante.

§ 13. Acquisition of additional real property. When any corporation, except a life insurance corporation, shall have sold or conveyed any part of its real property, the supreme court may, notwithstanding any restriction of a general or special law, authorize it to purchase and hold from time to time other real property, upon satisfactory proof that the value of the property so purchased does not exceed the value of the property so sold and conveyed within the three years next preceding the application.

Formerly L. 1890, ch. 563, § 10, as am'd by L. 1892, ch. 687, § 13; L. 1906, ch. 228.

It seems that this provision is to be read in connection with the preceding section only, and is not intended to apply to stock corporations.

The words "notwithstanding any restriction of a general or special law" were inserted by L. 1892, ch. 687, and the words "except a life insurance corporation" by L. 1906, ch. 228.

§ 14. Acquisition of property without the state. Any domestic corporation transacting business in other states or foreign countries may acquire and dispose of such property as shall be requisite for such corporation in the

convenient transaction of its business. Any domestic corporation establishing or maintaining a charitable, philanthropic or educational institution within this state may also carry on its work and establish or maintain one or more branches of such institution or an additional institution or additional institutions in any other state, the District of Columbia or in any part of the territories or dependencies of the United States of America or in any foreign country and for either of said purposes may take by devise or bequest, hold, purchase, mortgage, sell and convey or otherwise dispose of such real and personal property without this state as may be requisite therefor. But nothing in this section contained shall be construed as exempting from taxation property to any additional amount than is now allowed to such corporation under existing laws.

Formerly L. 1890, ch. 563, § 11, as am'd by L. 1892, ch. 687, § 14; L. 1893, ch. 178.

Any corporation acquiring property in other States or foreign countries should consult the statutes of the State or country in which the property is located.

A corporation of this State can exercise no power in another State without the sanction of such State. *Runyan v. Lessee of Coster*, 14 Peters (U. S.) 122; *Demarest v. Flack*, 128 N. Y. 205.

Every power which a corporation exercises in another State depends for its validity upon the laws of the sovereignty in which it is exercised, and a corporation can make no valid contract without the sanction, express or implied, of such sovereignty. *Runyan v. Lessee of Coster*, 14 Peters (U. S.) 129; *Briscoe v. Southern Kansas Ry. Co.*, 40 Fed. Rep. 280.

If such other State does not permit the corporation to acquire or hold real property, it must be expressed in some affirmative way. It cannot be inferred. *Cowell v. Springs Co.*, 100 U. S. 55; *Christian Union v. Yount*, 101 U. S. 352.

§ 15. Certificate of authority of a foreign corporation. No foreign stock corporation other than a moneyed corporation, shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is

such as may be lawfully carried on by a corporation incorporated under the laws of this state for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kinds of business respectively. The secretary of state shall deliver such certificate to every such corporation so complying with the requirements of law. No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state, unless prior to the making of such contract it shall have procured such certificate. This prohibition shall also apply to any assignee of such foreign stock corporation and to any person claiming under such assignee or such foreign stock corporation or under either of them. No certificate of authority shall be granted to any foreign corporation having the same name as an existing domestic corporation, or a name so nearly resembling it as to be calculated to deceive, nor to any foreign corporation, other than a moneyed or insurance corporation, with the word "trust," "bank," "banking," "insurance," "assurance," "indemnity," "guarantee," "guaranty," "savings," "investment," "loan" or "benefit" as a part of its name.

Former § 15, added by L. 1892, ch. 687, as am'd by L. 1901, ch. 96 and ch. 538; L. 1904, ch. 490.

For forms of papers under these provisions, see post, Forms Nos. 29-35.

The clause in the last sentence beginning with the words "nor to any foreign corporation," etc., was added by L. 1904, ch. 490.

Foreign corporations, in addition to procuring the certificate, must also pay a license fee. See § 181 of Tax Law, page 35, ante.

For definitions of "foreign," "stock" and "moneyed" corporations, respectively, see § 3, ante.

See, also, Penal Law, §§ 663 and 666, as to use of word "trust."

In relation to the proof to be filed with the Secretary of State in order to obtain the certificate of authority above provided for, see § 16.

For other provisions affecting foreign corporations, see reference to the same in the index under the heading "Foreign Corporations."

The provisions of the foregoing section of the law and of the next succeeding section, do not confer upon the Secretary of State

supervisory power over corporations organized in other States and doing business here so as to enable him to enforce a compliance with the terms of those sections. It rests entirely with the corporation itself to elect whether or not it will bring itself under the protection of the laws of this State, so as to make enforceable contracts within the State. The foregoing section provides that no foreign stock corporation, other than a banking or insurance corporation, shall do business in the State without having prior thereto procured from the Secretary of State a certificate of authority, and the next section, entitled "Proof to be filed before granting certificate," provides that, before the granting of such certificate, the corporation applying for the same must file a sworn copy of its charter or certificate of incorporation, and a statement under its corporate seal, setting forth the business or objects of the corporation which it is engaged in carrying on, or which it proposes to carry on, within the State, and a place within the State which is to be its principal place of business, and designating a person upon whom process against the corporation may be served within the State.

In addition to these requirements such corporations must pay a license fee in accordance with section 181 of the Tax Law. See page 35, ante.

Rights Conferred by Procuring Certificate.

A foreign corporation that has filed the papers and procured the certificate required by the foregoing section has the same right to transact business here as domestic corporations. *Lancaster v. Amsterdam Impmt. Co.*, 140 N. Y. 576. Provided the license fee prescribed by the Tax Law is paid within the specified time. Tax Law, § 181, page 35, ante.

When a foreign corporation is recognized by the authorities of the State of its domicile, it is entitled to be recognized here unless it appears that it was formed for purposes illegal or was doing acts prohibited by the laws of this State. *U. S. Vinegar Co. v. Schlegel*, 143 N. Y. 537; *Demarest v. Flack*, 128 N. Y. 205; *Lancaster v. Amsterdam Improvement Co.*, 140 N. Y. 576. Where it has filed a certificate of incorporation required by the laws of its State, it is a corporation de facto and questions of irregularity in organization are matters for that State to inquire into. *Id.*

The right of a foreign corporation to sue in this State is conferred by section 1779 of the Code. *O'Reilly, Skelly & Fogarty Co. v. Greene*, 18 Misc. 423.

Power of State to Impose Conditions.

The State has absolute power to exclude a foreign corporation. It may impose such conditions upon permitting the corporation to do business as it may judge expedient; and it may make the grant dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital. *Horn Silver Mining Co. v. New York*, 143 N. Y. 305; *Philadelphia Fire Assn. v. New York*, 119 U. S. 110; *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181; *Norfolk & W. R. R. Co. v. Pennsylvania*, 136 U. S. 114; *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Peo. ex rel. Southern Cotton Oil*

Co. v. Wemple, 131 N. Y. 64; Bank of Augusta v. Earle, 13 Pet. (U. S.) 519; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727; Christian Union v. Yount, 101 U. S. 352; Peo. v. Formosa, 131 N. Y. 478; Demarest v. Flack, 128 N. Y. 205.

Corporations are not citizens within the meaning of the Constitution of the United States, article 4, section 2, clause 1, declaring that "the citizens of each State shall be entitled to all privileges and immunities of citizens, in the several States." They are creatures of local law, and have no absolute right of recognition in other States, but depend for that and for enforcement of their contracts upon the assent of those States, which may be given on such terms as they please. Paul v. Virginia, 8 Wall. (U. S.) 168. Same rule upheld in Pembina Mining Co. v. Pennsylvania, 125 U. S. 181; Norfolk & W. R. R. v. Pennsylvania, 136 U. S. 114, and Horn Silver Mining Co. v. New York State, 143 U. S. 305.

The provisions in the fourteenth amendment to the United States Constitution, section 1, that "no State shall deny to any person within its jurisdiction the equal protection of the laws," do not prohibit a State from requiring for the admission of a foreign corporation such conditions as it chooses. Pembina Mining Co. v. Pennsylvania, 125 U. S. 181.

The only limitation upon the power of the State to exclude a foreign corporation, or to exact conditions for allowing it to do business or hire offices there, arises where the corporation is in the employ of the Federal government, or where its business is commerce, interstate or foreign. Pembina Mining Co. v. Pennsylvania, supra; Peo. ex rel. Southern Cotton Oil Co. v. Wemple, 131 N. Y. 64.

A statute granting powers and privileges to corporations must, in the absence of plain indications to the contrary, be held to apply only to domestic corporations. In re Estate of Prime, 136 N. Y. 347.

Doing Business Within the State.

The doing of isolated acts of business within a State is not "doing business" within such a prohibition. Cooper Mfg. Co. v. Ferguson, 113 U. S. 727; National Knitting Co. v. Bronner, 20 Misc. 125. A foreign corporation engaged in running a steamboat, and which has no place of business, agent or representative in the State, and has made no contract in relation to its business within the State, is not doing business in the State within the meaning of this section. Savage v. Atlanta Home Ins. Co., 55 App. Div. 20.

A foreign corporation having no property or office in this State by entering into a contract of sale of paving stones quarried in another State to be delivered here from time to time over a period of ten months is not doing business here within the meaning of this section, where such sale is the only business ever transacted in this State. Haddam Granite Co. v. Brooklyn Hts. R. R. Co., 131 App. Div. 685.

A foreign corporation having no office in this State and doing no business here other than selling and installing furnaces under contracts proposed in writing from the foreign State, and confirmed in that State after acceptance here, can recover on such contract although it has no certificate of authority under this action. J. L. White Furnace Co. v. C. W. Miller Transfer Co., 131 App. Div. 559.

Where a foreign corporation had no office or place of business in this State the fact that its travelling salesman took orders here, subject to the approval of the corporation at its office in another State, does not place it in the position of "doing business in this State." *Tallapoosa Lumber Co. v. Holbert*, 5 App. Div. 559; *Murphy Varnish Co. v. Connell*, 10 Misc. 553; *National Knitting Co. v. Bronner*, 20 Misc. 125; *Novelty Mfg. Co. v. Connell*, 88 Hun 254; *Vaughn Machine Co. v. Lighthouse*, 64 App. Div. 138; *Jones v. Keeler*, 40 Misc. 221. Orders so taken for approval at the home office do not constitute a contract in this State even though the corporation has an office here. *American Broom & Brush Co. v. Addicks*, 19 Misc. 36; *Cummer L. Co. v. Association Mfrs. Ins. Co.*, 67 App. Div. 151; *N. Y. Terra-Cotta Co. v. Williams*, 102 App. Div. 1, *affd.*, 184 N. Y. 579.

The fact that a foreign corporation consigns a portion of its goods to brokers, its agents, and that sales are made in the State from such goods, either directly at a price fixed by the corporation or in fulfillment of orders approved by it, the proceeds being deposited to the credit of the corporation in a bank in this State, and the charges of the brokers being paid by check after the deposit instead of being deducted before the deposit, does not constitute doing business within the State under the Tax Law. *Peo. ex rel. Southern Cotton Oil Co. v. Roberts*, 25 App. Div. 13.

Soliciting orders through agents is not "doing business" in New York so as to require a certificate. *Vio Chemical Co. v. Studholme*, 53 Misc. 470. See also same holding in *Bruner v. Kansas Moline Plow Co.*, 168 Fed. 218.

Where a foreign corporation consigns goods to persons in this State for sale, and sales are made by the factor in his own name, and the proceeds collected and accounted for by him, such corporation does not do business in this State within the meaning of this provision, and no certificate is necessary to enable it to maintain an action to recover the net proceeds of such goods. *Bertha Zinc & Mineral Co. v. Clute*, 7 Misc. 123. See also *Brown Seed Co. v. Richardson*, 53 Misc. 517.

A contract between two foreign corporations by a written order mailed within the State and accepted in another State is not a contract made within this State, as it was not completed until the acceptance of the order; therefore, a certificate authorizing the vendor corporation to do business here was not necessary. *Shelby Steel Tube Co. v. Burgess Gun Co.*, 8 App. Div. 444. A cause of action based on default in paying for goods delivered in this State on such contract arises here, and can be maintained under subdivision 3, section 1780 of the Code, which provides that an action may be maintained by one corporation against another "where the cause of action arose within the State." *Id.*

Merely making a contract in New York, no sales being made or business transacted, does not constitute "doing business" requiring a certificate of authority. *Com'l Wood & Cement Co. v. Northampton Portland Cement Co.*, 41 Misc. 242.

The State cannot prohibit a foreign corporation from selling within the State merchandise to be manufactured outside the State nor impose burdensome conditions on such sale, for such action

would conflict with the commerce clause of the United States Constitution. *Hargrave's Mills v. Harden*, 25 Misc. 665.

A foreign corporation which consigns fruit to New York, to be sold by consignee on a profit-sharing basis, is not transacting business in New York so as to require a certificate. *Brown Seed Co. v. Richardson*, 53 Misc. 517.

A foreign corporation which merely maintains a salesroom in this State where only samples are kept, all orders being filled by the home office, is not "doing business" in this State. *Burrowes v. Caplin*, 127 App. Div. 317; *Fresno Home Packing Co. v. Turle & Skidmore*, 60 Misc. 79.

Where a foreign corporation is engaged in "buying and selling accounts, making contracts and purchasing outstandings," it will be presumed to be a stock corporation in the absence of proof to the contrary. *Manufrs. Com'l Co. v. Blitz*, 131 App. Div. 17.

Where a New Jersey corporation owning a steamboat and confining its business to running the same and leasing it, had never procured the required certificate and receipt, the mere fact that at one time the boat was run as a ferry between two points in New York harbor will not be construed to be the doing of business within the State so as to bar an action on a fire insurance policy on the boat, since the license fees imposed by such statutes are taxes on business and cannot be imposed on the transportation of persons or property over public waters without interfering with the constitutional right of Congress to regulate commerce. *Savage v. Atlanta Home Ins. Co.*, 55 App. Div. 20.

This section does not prevent a foreign corporation doing business in the State of New York without having procured the necessary certificate, from recovering in a suit brought against it upon a counterclaim growing out of the transaction upon which the plaintiff sued. *Alsing Co. v. N. E. Quartz Co.*, 66 App. Div. 473, *affd.*, 174 N. Y. 536.

A foreign corporation is not doing business in the State by taking out a fire insurance policy in a domestic insurance company on its plant and material through insurance brokers in the State. *Cummer Lumber Co. v. Associated Mfrs. Mut. Fire Ins. Co.*, 67 App. Div. 151, *affd.*, 173 N. Y. 633.

The sale of a single cargo of coal in this State by a foreign corporation through an agent does not constitute "doing business" in the State so as to require a certificate. *Ozark Cooperage Co. v. Quaker City Cooperage Co.*, 98 N. Y. Supp. 113.

A foreign corporation, the office of which is in another State and which merely has an agent in this State, who maintains an office for his own convenience and does not have exclusive control of the business in the State and keeps no books nor bank account, and makes no contracts for the sale of goods, but reports everything to the home office, and who usually makes sales to parties outside the State, and, while a particular sale was made of coal situated in the State to a resident, is not doing business in the State within the terms of this section. *Penn Collieries Co. v. McKeever*, 183 N. Y. 98, *affg.* 93 App. Div. 303. There must be corporate continuity of conduct in respect to doing business. *Id.*

Doing business means maintaining an office and having capital

invested and carrying on a regular business, and the mere furnishing, under a contract with the owner, of materials for a building, by a foreign corporation, was not a doing of business, so as to preclude an action on a contract. *N. Y. Architectural Terra Cotta Co. v. Williams*, 102 App. Div. 1, *affd.*, 184 N. Y. 579.

A foreign corporation, having an office in this State, which contracts to supply labor and materials and construct elevators in buildings in New York is "doing business" here within the meaning of this section. *Portland Co. v. Hall & Grant Construction Co.*, 121 App. Div. 779. But see 123 *id.* 495 and 124 *id.* 937.

A foreign corporation by disposing of its bonds and stock in this State, or by borrowing money on its obligations, is not doing business here within the meaning of this section. *Union Trust Co. v. Sickels*, 125 App. Div. 105; *Same v. Rauber*, 125 App. Div. 902; *Same v. Finucane*, 125 App. Div. 902.

Payment of License Tax.

The acceptance of a license tax by the State Treasurer, although seemingly implying an authority to do business in this State, would not constitute a waiver by the State of the requirements of sections 15 and 16 of this law, which make the issuance of a certificate of authority before the making of a contract a prerequisite to the maintaining of an action thereunder. *Emmerich Co. v. Sloane*, 108 App. Div. 330.

Proof of compliance with this section must be made by the plaintiff (and in that respect it differs from proof of non-compliance with section 181 of the Tax Law which is a matter of defense, and must be pleaded and proved by the defendant. *Manufrs. Com'l Co. v. Blitz*, 131 App. Div. 17, citing *Halsey v. Jewett Dramatic Co.*, 190 N. Y. 231, *revsg.* 114 App. Div. 420.

Failure of the complaint in an action by a foreign corporation to allege payment of the license fee is not a demurrable defect. *O'Reilly, Skelly & Fogarty Co. v. Greene*, *supra*; *Halsey v. Jewett Dramatic Co.*, 190 N. Y. 231, *revsg.* 114 App. Div. 420.

The provisions of section 181 of the Tax Law constitute a condition subsequent to the right of a foreign corporation to carry on business within the State, and, in an action by such a corporation, non-compliance is a matter of defense to be availed of by answer; but the requirement of section 15 of the General Corporation Law is a condition precedent to the right of a foreign corporation to make enforceable contracts in the State and compliance must be pleaded. *Wood & Selick v. Ball*, 190 N. Y. 217, *affg.* 114 App. Div. 743, and explaining *Welsbach Co. v. Norwich G. & E. Co.*, 96 App. Div. 52, *affd.*, 180 N. Y. 533; *Parmelee Co. v. Haas*, 171 N. Y. 579. To same effect as 190 N. Y. 217, *supra*, see *Halsey v. Jewett Dramatic Co.*, 190 N. Y. 231, *revsg.* 114 App. Div. 420.

Cases Superseded by Amendment of 1901.

It has been held that a contract made in this State by a foreign corporation before it obtained a certificate of authority to transact business within the State is enforceable as soon as such certificate is procured. *Neuchatel Asphalt Co., Ltd. v. The Mayor, etc., of N. Y.*,

155 N. Y. 373, affg. 12 Misc. 26; Reedy Elevator Co. v. Am. Grocery Co., 23 Misc. 520; both cases in effect overruling Providence Steam & Gas Pipe Co. v. Connell, 86 Hun 319. But these have been superseded by the amendment of 1901, chapter 538, in effect September 1, 1901, which provides that the certificate of authority must be procured prior to the making of contracts.

The amendment of 1901 is not applicable to a contract made prior to its enactment, as to hold otherwise would violate the constitutional provisions protecting the obligations of contracts from impairment. *McNamara v. Keene*, 49 Misc. 452; *Lewis Pubg. Co. v. Lenz*, 86 App. Div. 451.

Rights of Assignees of Foreign Corporations.

It has been held that where a foreign corporation has been doing business within the State for more than thirteen months, without having paid the license tax required by section 181 of the Tax Law, it cannot maintain an action in this State, and that its assignee cannot be in a better position than the assignor. *Mueller v. William F. Wall Rope Co.*, 53 N. Y. Supp. 255; *Kinney v. Reid Ice Cream Co.*, 57 App. Div. 206, in effect overruling *Lindheim v. Sitt*, 68 N. Y. Supp. 145. These decisions were rendered prior to the enactment of chapter 538 of the Laws of 1901, in effect September 1, amending section 15 in respect to assignees of foreign corporations. This section as amended now expressly provides that the assignee shall have no right of action in this State where the assignor, being a foreign corporation, has failed to comply with the law, thereby conforming the law to the rule laid down in 57 App. Div. 206, *supra*. But see *Box Board & L. Co. v. Vincennes Paper Co.*, 45 Misc. 1, affd., 98 App. Div. 623.

The assignee of a foreign corporation is in no better position than the corporation itself and cannot sue on a contract made by the corporation in New York before it had obtained a certificate of authority to do business, even though it had paid the license tax required by the Tax Law. *Emmerich v. Sloane*, 95 N. Y. Supp. 39, 46 Misc. 513, affd., 108 App. Div. 330.

This section it seems only prohibits actions upon contracts made in this State by foreign corporations which have failed to procure the necessary certificate, and has no application to actions upon contracts made by other parties and assigned to such corporations. *O'Reilly, Skelly & Fogarty Co. v. Greene*, 18 Misc. 423, affg. 17 Misc. 302.

An assignment for the benefit of creditors, made in this State by an insolvent foreign corporation, valid under the law of its domicile, will be recognized as valid here. *Vanderpoel v. Gorman*, 140 N. Y. 563. Such an assignment is not violative of the provision of the Stock Corporation Law, section 66, which prohibits a transfer or assignment by a corporation in contemplation of insolvency; that provision refers solely to domestic corporation. *Id.*

Contracts Made Prior to December 31, 1892.

A foreign corporation without a certificate of authority may nevertheless sue in New York upon contracts made prior to the enactment

of the foregoing section. *Atlantic Construction Co. v. Kreusler*, 40 App. Div. 268; *Providence Steam & Gas Pipe Co. v. Connell*, 86 Hun 319; *O'Reilly, Skelly & Fogarty Co. v. Greene*, 18 Misc. 423, affg. 17 Misc. 302.

Attachments by Foreign Corporations.

The Code of Civil Procedure provides in what cases attachments may be issued, and what is necessary to be shown by plaintiff to entitle him to the attachment, but these provisions are not exclusive, and the Legislature may affix other conditions to the right of invoking such remedy. As a remedy by attachment is a step in an action the provisions of section 15 of the General Corporation Law apply, and the papers upon which a foreign corporation doing business in the State, in relation to a transaction within the State, must show, for the purposes of the attachment, that the corporation has complied with said section 15. *Sawyer Lumber Co. v. Bussell*, 84 Hun 114.

Where it does not appear that a foreign corporation is doing business in the State and the action is not upon a contract made within the State compliance with the Gen. Corp. L., § 15, need not be alleged in attachment papers. *Lukens Iron & Steel Co. v. Payne*, 13 App. Div. 11, distg. *Sawyer L. Co. v. Bussell*, supra. See, also, *Box Board & L. Co. v. Vincennes Paper Co.*, 45 Misc. 1, affd., 98 App. Div. 623.

Where a foreign corporation fails to allege in attachment papers that it had obtained a receipt for tax for the privilege of doing business within the State, or whether or not the thirteen months' limit has passed since it commenced to do business, it is a defect, and an averment in an affidavit that the corporation has complied with the requirements of sections 15 and 16 of the General Corp. L., and with all the requirements of law to authorize it to do business in this State, does not remedy the defect. *Reedy Elevator Co. v. Am. Grocery Co.*, 24 Misc. 678. See, also, 23 Misc. 520.

An assignee of a foreign corporation need not allege compliance by the assignor with the provisions of section 181 of the Tax Law. *Box Board & L. Co. v. Vincennes Paper Co.*, supra.

Attachments Against Foreign Corporations.

An attachment may issue against the New York property of a foreign corporation however solvent it may be. It is powerless to prevent a creditor, or a fictitious claimant even, from obtaining an attachment. *Robertson v. Ongley Electric Co.*, 82 Hun 585.

Section Applies only to Actions on Contract.

The provisions of this section apply to actions on contract only, and have no application to a judgment creditor's action brought to set aside alleged fraudulent transfers and conveyances. *Joseph Schlitz Brewing Co. v. Ester*, 86 Hun 22, affd., 157 N. Y. 714.

A foreign stock corporation is not prevented by the foregoing section from maintaining an action of replevin, such action being purely *ex delicto*, and not *ex contractu*. *American Typefounders Co. v. Conner*, 6 Misc. 391, 26 N. Y. Supp. 742.

A foreign corporation, not authorized to transact business within the State, may file a mechanic's lien against the owner of a house in this State in whose construction its goods have been used, where it appears that the goods were delivered by it, within the State, to a domestic corporation, which in turn furnished them to the owner. *Matter of Simonds Furnace Co.*, 30 Misc. 209; *N. Y. Architectural Terra Cotta Co. v. Williams*, 102, App. Div. 1, *affd.*, 184 N. Y. 579.

Contracts Made Elsewhere.

This section only applies to foreign corporations doing business within the State, therefore a foreign corporation may sue in this State on a contract made in another State. *Batchelder & Lincoln Co. v. Knopf*, 54 App. Div. 329. See, also, to same effect, *Robinson v. American Linseed Co.*, 147 Fed. 885.

The bringing of an action in this State by a foreign corporation is not evidence that the contract upon which the action is based was made in the State of New York. *Lukens Iron & Steel Co. v. Payne*, 13 App. Div. 11.

Supplementary Proceedings.

Under the provisions of the Code, in reference to supplementary proceedings (§§ 2435, 2452, 2458, 2463), proceedings may be instituted against a foreign corporation having no agent and doing no business in this State, and a receiver of its property in this State may be appointed. *Logan v. McCall Pub'g Co.*, 140 N. Y. 447, *revsg.*, 6 Misc. 635. The policy of this State does not preclude a creditor of such a corporation from obtaining a preference upon assets here. *Id.* See, also, *Vietor v. Richards Co.*, 26 Civ. Pro. 295.

The officers of a domestic corporation may be examined in supplementary proceedings. *Rabhe v. Astor Trust Co.*, 61 Misc. 650.

Lack of Certificate.

A complaint in an action brought by a foreign stock corporation must allege a compliance with this section. *Welsbach Co. v. Norwich G. & E. Co.*, 96 App. Div. 52, *affd.*, 180 N. Y. 533. See, also, *Parmele Co. v. Haas*, 171 N. Y. 579.

The objection that a foreign corporation, which has brought an action upon the contract made by it in this State, has not procured a certificate of authority, is an affirmative defense, and is not available unless pleaded. *W. P. Fuller & Co. v. Schrenk*, 58 App. Div. 222, *affd.*, 171 N. Y. 671; *O'Reilly, Skelly & Fogarty Co. v. Greene*, 18 Misc. 423; *Nicoll v. Clark*, 13 Misc. 128. A denial of knowledge or information sufficient to form a belief as to the truth of the allegation in the complaint that the plaintiff is a foreign corporation is not sufficient. *Internat'l Society v. Dennis*, 76 App. Div. 327. But see the later cases which hold as follows:

A foreign stock corporation doing business in this State must allege and prove that it had obtained the license prior to the making of the contract upon which the action is brought, and if it fails to do this neither it nor the assignee can maintain any action on such contract. *Manufrs. Com'l Co. v. Blitz*, 131 App. Div. 17,

citing *South Bay Co. v. Howey*, 190 N. Y. 240; *Welsbach Co. v. Norwich Gas & El. Co.*, 180 N. Y. 533.

The complaint of a foreign corporation seeking to recover for goods sold in this State which fails to allege compliance with section 15 does not state a cause of action. The defense need not be taken by demurrer or answer but is available on motion for nonsuit after the evidence is in. When the complaint alleges that the plaintiff is a foreign corporation, which the answer admits, a nonsuit will not be refused on the ground that the plaintiff was not shown to be a stock corporation when the contention was not made by the corporation at the time. *Wood & Selick v. Ball*, 114 App. Div. 743, *affd.*, 190 N. Y. 217.

Where the complaint sets forth facts showing that plaintiff is a foreign corporation doing business in the State and that the contract was made in New York, compliance with this section must be pleaded, or a demurrer will be sustained. *Welsbach Co. v. Norwich G. & E. Co.*, 96 App. Div. 52, *affd.*, 180 N. Y. 533. See, also, *Parmelee v. Haas*, 171 N. Y. 579; *Emmerich v. Sloane*, 108 App. Div. 330; *Ozark Cooperage Co. v. Quaker City Cooperage Co.*, 112 App. Div. 62.

A negotiable instrument is presumed to have been made where it is dated, and hence a promissory note dated in the city of New York must be deemed to be a contract made in this State. *Manufrs. Com'l Co. v. Blitz*, 131 App. Div. 17.

Where the payee of a note made in this State is a foreign stock corporation, its assignee suing on the instrument in this State must allege and prove that the payee prior to the delivery of the note had obtained a certificate of authority. *Manufrs. Com'l Co. v. Blitz*, 131 App. Div. 17.

The penalty imposed upon a foreign corporation for doing business within the State, without first obtaining a certificate of authority, is regulated solely by this action. While the penalty imposed upon such a corporation for a failure to pay the license tax is regulated by section 181 of the Tax Law, which supersedes, if it does not actually repeal, chap. 240, L. of 1895 (now specifically repealed by Tax Law), which provides "No action shall be maintained or recovery had in any of the courts of this State by such foreign corporation doing business in this State without obtaining the certificate of authority prescribed by law, and a receipt for the license fee hereby imposed." *Alsing Co. v. N. E. Quartz Co.*, 66 App. Div. 473, *affd.*, 174 N. Y. 536.

An action by a foreign stock corporation engaged in the business of manufacturing within the State, to recover upon a policy of insurance executed within the State, for a loss occasioned by the destruction of its property within the State by fire, cannot be maintained unless prior to the making of the contract of insurance it had procured the required certificate. *South Bay Co. v. Howey*, 190 N. Y. 240, *revsg.* 113 App. Div. 382.

Contracts Enforceable in Federal Courts.

Contracts made in New York by a foreign corporation which is doing business here without having complied with the statutory requirements are unenforceable in the State courts, but they are not

void. Their validity and enforceability is recognized in the Federal courts. *Groton Bridge Mfg. Co. v. American Bridge Co.*, 151 Fed. 871.

Exclusive Remedy Elsewhere Bars Action Here.

The statutory liability of stockholders in foreign corporations for corporate debts cannot be enforced except at the domicile of the corporation, when the law of the domicile provides the remedy. *Marshall v. Sherman*, 148 N. Y. 9, revsg. 84 Hun 186; explained and distinguished in *Knickerbocker Trust Co. v. Iselin*, 109 App. Div. 688, 689.

An action to enforce the statutory liability of the stockholders of an insolvent foreign corporation cannot be maintained in the courts of the State of New York when the statutes of the State in which such foreign corporation is located provide a special remedy, which is exclusive of all other remedies, and can only be administered in such State. Where the remedy is of such a character that it can only have effectual operation in one forum, a party interested should not be permitted to enforce it in another place. *Cleveland, Lorain & Wheeling Ry. Co. v. Kent*, 87 Hun 328. Statutes relating to procedure have no extra-territorial effect. *Id.*

Infringement of Name.

Where a foreign corporation does business in the State without complying with the statutes entitling it to transact business here, and a domestic corporation, subsequently organized, adopts the same name as that used by the foreign corporation without knowledge of the existence of such corporation, it will not be restrained, upon motion for a preliminary injunction made in an action brought against it by the foreign corporation, from using the name adopted by it during the pendency of the action. *American Tartar Co. v. American Tartar Co.*, 57 App. Div. 411.

Receivers of Foreign Corporations.

The courts of this State have power to appoint a receiver of a foreign corporation to preserve assets within their jurisdiction for the protection of domestic creditors. *Hall v. Holland House Co.*, 12 Misc. 55; *Popper v. Supreme Council Order of Chosen Friends*, 61 App. Div. 405. And this is true even though a receiver has been appointed in the State of its creation. *Phoenix Foundry & M. Co. v. N. R. Const. Co.*, 6 Civ. Pro. 106.

A receiver of a foreign corporation may enforce in this State the liability of a stockholder incurred under a statute of the foreign State. *Wigton v. Kenney*, 51 App. Div. 215. See, also, *Am. Nat. Bank v. Nat. Ben. & C. Co.*, 70 Fed. 420.

A foreign corporation may sue in its own name in this State, notwithstanding the appointment of a receiver pendente lite by the United States Circuit Court in another State. *Sigua Iron Co. v. Brown*, 33 Misc. 50, affd., 171 N. Y. 488.

The right of a foreign receiver to sue in New York is exhaustively considered in *Matter of Waite*, 99 N. Y. 433.

A sequestrator of the property of a foreign corporation may main-

tain an action in this State to set aside a transfer made by the corporation in fraud of creditors. *Barclay v. Quicksilver Mining Co.*, 6 Lans. 25.

The courts of New York have no power to appoint a receiver for a foreign corporation itself, but only of its assets in New York State. *Reusens v. Man'f'g & Selling Co.*, 99 App. Div. 214.

Rights of Resident Stockholders.

Resident stockholders of a foreign corporation may maintain an action to prevent waste, and to compel restitution for stock or property improperly diverted. *Nash v. Hall*, 11 Misc. 468.

An owner and transferee of stock in a foreign corporation may maintain an action to compel the corporation to recognize the transfer, record it on their books, and issue new stock in place of the old, and may, in the same action, obtain the additional relief of enjoining the corporation from a proposed illegal issue of preferred stock. *Ernst v. Elmira Municipal Imp. Co.*, 24 Misc. 583.

The courts of this State will enjoin a New Jersey corporation with its plant in Pennsylvania and its principal office in New York and all of whose directors are residents of New York from making an illegal issue of stock. *Kraft v. Griffin Co.*, 82 App. Div. 29.

A stockholder's action may be maintained in New York against a director of a New Jersey corporation to recover the amount of dividends declared in violation of the laws of that State. *Hutchinson v. Stadler*, 85 App. Div. 424; *Hutchinson v. Curtis*, 45 Misc. 484.

In an action by a stockholder of a foreign corporation to set aside a transfer of patent rights alleged to have been made in fraud of stockholders the plaintiff is entitled to inspection of the contracts transferring the patent rights and the resolution of the directors in relation thereto if they are in the State. *Snyder v. De Forest Wire-less Telegraph Co.*, 113 App. Div. 840.

A stockholder's liability to creditors, fixed, by a foreign statute creating the corporation, at double the par value of the stock held, is not enforceable in New York since the liability is penal and not contractual. *Knickerbocker Trust Co. v. Iselin*, 185 N. Y. 54.

The courts of one State will not enforce the penal laws of other States. *Hutchinson v. Stadler*, 85 App. Div. 424, 430.

Statute of Limitations.

A foreign corporation cannot avail itself of the statute of limitations of the State of New York in an action brought in the New York courts. *Robeson v. Central R. R. Co. of N. J.*, 76 Hun 444; *Boardman v. Lake Shore & M. S. Ry. Co.*, 84 N. Y. 185; *Rathbun v. Northern Central Ry. Co.*, 50 N. Y. 656; *Olcott v. Tioga R. R. Co.*, 20 N. Y. 210; *Mallory v. Tioga R. R. Co.*, 3 Keyes 354.

A foreign corporation which has strictly complied with the provisions of subdivision 2 of section 432 of the Code of Civil Procedure, by designating a person in this State upon whom service of summons may be made may take advantage of the defense of the Statute of Limitations. *Wilmerding v. New York, N. H. & H. R. R.*, 124 App. Div. 205, *affd.*, 193 N. Y. 602.

§ 16. **Proof to be filed before granting certificate.** Before granting such certificate the secretary of state shall require every such foreign corporation to file in his office a sworn copy in the English language of its charter or certificate of incorporation and a statement under its corporate seal, and the signature of its president, vice-president or other acting head, particularly setting forth the business or objects of the corporation which it is engaged in carrying on or which it proposes to carry on within the state, and a place within the state which is to be its principal place of business, and designating a person upon whom process against the corporation may be served within the state. The person so designated must have an office or place of business at the place where such corporation is to have its principal place of business within the state and such designation must specify such office or place of business of the said person so designated, and if it is within a city the street and street number if any, or other suitable designation of the particular locality. Such designation shall be accompanied with the written consent of the person designated and shall continue in force until revoked by an instrument in writing designating in like manner some other person upon whom process against the corporation may be served in this state or until the filing in the same office of a written revocation of said consent executed by the person so designated. If the person so designated dies or removes from the place where the corporation has its principal place of business within the state, or files such revocation of his consent, and the corporation does not within thirty days after such death or removal or revocation of consent designate in like manner another person upon whom process against it may be served within the state, the secretary of state may revoke the authority of the corporation to do business within the state, and process

against the corporation in an action upon any liability incurred within this state before such revocation, may, after such death or removal, or revocation of consent, and before another designation is made, be served upon the secretary of state. At the time of such service the plaintiff shall pay to the secretary of state two dollars, to be included in his taxable costs and disbursements, and the secretary of state shall forthwith mail a copy of such notice to such corporation if its address, or the address of any officer thereof, is known to him. The secretary of state may require the execution of any such designation, revocation or consent, to be authenticated as he deems proper and he may refuse to file it without such authentication.

Formerly § 16, added by L. 1892, ch. 687, as am'd by L. 1895, ch. 672; part of subd. 2, § 432, Code Civ. Pro., incorporated by L. 1909, ch. 28.

By L. 1895, ch. 672, the words "in the English language" in the fourth line were inserted.

The Secretary of State has rejected many papers drawn under this section which in his opinion set forth objects not within the scope of the act, but in only one case has his action been contested in the courts. In this case a corporation organized under a special act of the Legislature of New Hampshire was authorized to carry on the business of a safe deposit and trust company and to deal in money and securities. It desired authority to carry on in this State a portion of the business for which it was organized, and presented for filing papers in which the business to be carried on here was stated to be the purchase and sale of the stock, bonds and other written evidences of indebtedness of public corporations, to wit, stock, bonds and other written evidences of indebtedness of States, cities, villages, towns and other political subdivisions. The Secretary of State refused to file the papers or to issue a certificate for the reason that it being a banking corporation, invested with banking powers, could not do business by authority from the office of the Secretary of State. The corporation applied for a writ of mandamus to compel the filing of the papers. The writ was denied. Decided March 18, 1893, in Supreme Court, Special Term, Third Department; Herrick, Justice. No appeal was taken. *People ex rel. E. H. Rollins & Sons v. Rice.*

A foreign corporation applied to the Secretary of State for a certificate of authority to carry on the business of acting as trustee, and also to guarantee contracts. The certificate was refused. In this case the Attorney-General, in an opinion dated April 30, 1897, held, that where a company proposed to act in

the capacity of a trustee the business came within the provisions of subdivision 4 of section 156 of the Banking Law, and that the guarantee feature was a purpose provided for by subdivision 4, section 70 of the Insurance Law; therefore, the purposes set forth were those of a moneyed corporation, and not within the scope of sections 15 and 16 of this law.

Exemplified Copy of Designation as Evidence.

An exemplified copy of a designation of a person upon whom to make service filed by a foreign corporation as provided in section 16 of the General Corporation Law, accompanied with a certificate that it has not been revoked, is presumptive evidence of the execution thereof, and conclusive evidence of the authority of the officer executing it. Code Civ. Pro. § 931a, added by L. 1909, ch. 65.

Provisions of the Code of Civil Procedure, Relative to Service of Summons Upon Foreign Corporations

Personal service of the summons upon a defendant, being a foreign corporation, must be made by delivering a copy thereof, within the state, as follows:

1. To the president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary; or, if the corporation lacks either of those officers, to the officer performing corresponding functions, under another name.

2. To a person designated for the purpose as provided in section sixteen of the general corporation law.

3. If such a designation is not in force, or if neither the person designated, nor an officer specified in subdivision first of this section, can be found with due diligence, and the corporation has property within the state, or the cause of action arose therein; to the cashier, a director, or a managing agent of the corporation, within the state.

4. If the person designated as provided in section sixteen of the general corporation law dies or removes from the place where the corporation has its principal place of business within the state and the corporation does not within thirty days after such death or removal designate

in like manner another person upon whom process against it may be served within the state, process against the corporation in an action upon any liability incurred within this state or if the corporation has property within the state may after such death, removal or revocation and before another designation is made be served upon the secretary of state.

Code Civ. Pro. § 432, as am'd by L. 1903, ch. 311; L. 1909, ch. 65.

The provisions of this article, relating to the mode of service of a summons, apply likewise to the service of any process or other paper, whereby a special proceeding is commenced in a court, or before an officer, except a proceeding to punish for contempt, and except where special provisions for the service thereof is otherwise made by law.

Code Civ. Pro. § 433.

Proof of service, as prescribed in this article, must be made by affidavit, except as follows:

1. If the service was made by the sheriff, it may be proved by his certificate thereof. * * *

Code Civ. Pro. § 434.

Meaning of Managing Agent.

In determining what agents are managing agents under this section of the Code each case must necessarily depend upon its own facts. A reasonable requirement is that the person served should be of sufficient responsibility to render it probable that the company will receive notice of the service. *Coler v. Pittsburgh Bridge Co.*, 84 Hun 285, revsd. on other grounds, 146 N. Y. 281.

The term "managing agent" imports a person invested with general powers involving the exercise of judgment and discretion. Where the foreign corporation has not designated any person as prescribed, the service of a summons upon one having no other connection with the corporation than that of attorney of record in an action to which the corporation is a party, gives the court no jurisdiction. *Taylor v. Granite State P. Assn.*, 136 N. Y. 343; *Reddington v. Mariposa L. & M. Co.*, 19 Hun 405; *Palmer v. Penn Co.*, 35 Hun 369; *Tuchband v. C. & A. R. R. Co.*, 115 N. Y. 437.

An agent who has general supervision of a business is a managing agent, although the district in which his powers are exercised may be limited. *Mullins v. Met. Life Ins. Co.*, 78 Hun 297; *Ives v. Same*, 78 Hun 32. An agent who merely superintends certain soliciting agents and has no authority to employ or discharge them is not a managing agent. *Schryver v. Same*, 29 N. Y. Supp. 1092.

The term "managing agent" includes any person holding some responsible and representative relation to the company. *Coler v. Pittsburgh Bridge Co.*, 146 N. Y. 281.

An agent of a foreign newspaper corporation who signs as its "eastern representative," and conducts its business transacted in the State, is the managing agent of the corporation within the meaning of subdivision 3 of the foregoing section. *Palmer v. Chicago Evening Post Co.*, 85 Hun 403.

Service of summons on the general superintendent of the work of operating the lines of a domestic telegraph company is sufficient as a service on the "managing agent." *Barrett v. Am. Telephone & Teleg. Co.*, 138 N. Y. 491, affg. 56 Hun 430.

Where it appears that a person has been managing agent for a corporation, the burden rests upon the corporation to show a termination of such relation. *Id.*

When no designation has been made service upon a special agent is proper if it does not appear that he was not the president or secretary of the corporation or an officer performing corresponding functions, or its cashier, director or managing agent. *Silver v. Western Assurance Co.*, 3 App. Div. 572.

When the person designated by a foreign corporation cannot be found within the State, a delivery of the summons and complaint to the custodian of property attached and a delivery thereof by the latter to the managing agent of the corporation, who calls the attention of the board of directors of the corporation thereto, is a sufficient service to support the attachment, although the papers were not delivered to such agent with intent to effect a service, and were subsequently returned to said custodian. *Kieley v. Central Complete Combustion Mfg. Co.*, 13 Misc. 85.

A designation, under section 30 of the Insurance Law, chapter 690, Laws of 1892, of the superintendent of insurance as the person upon whom service of process may be made in an action against a foreign insurance corporation does not preclude service of summons pursuant to the foregoing section. *Silver v. Western Assurance Co.*, 3 App. Div. 572; *Howard v. Prudential Ins. Co.*, 1 App. Div. 135. In such case a proper service may be made upon a foreign insurance corporation either under the provisions of the Code or the Insurance Law. 3 App. Div. 572, *supra*.

Officer Temporarily in State.

A New York court cannot acquire jurisdiction of a foreign corporation, which is not doing business in the State, by service of summons on its president, who is in the State on private business, although the corporation had previously done business

here, and the president, when served, had incidentally called in relation to a contract growing out of such business, but which had been completed. *Buffalo Sandstone Brick Co. v. Am. Sandstone Brick Mach. Co.*, 141 Fed. 211. Also, to the same effect, *Donovan v. Dixieland Am. Co.*, 152 Fed. 661; *Case v. Smith, Lineaweaver & Co.*, 152 Fed. 730; *Ladd Metals Co. v. Am. Min. Co.*, 152 Fed. 1008.

Where a foreign corporation has complied with all statutory requirements to do business in the State and after transacting business here ceased such business, revoked the designation of its agent and withdrew its office and property from the State, its subsequent maintenance of an action in a State court, which was begun before it withdrew from the State and related to its business therein, does not constitute a continuance of such business so as to subject it to suit therein by making service on the Secretary of State. *Lathrop-Shea & Henwood Co. v. Interior Const. & Imp. Co.*, 150 Fed. 666.

§ 17. Reincorporation of foreign moneyed corporations. Any moneyed corporation duly organized by or under the laws of any state of the United States, and having an office or doing business in this state, may file, if a banking corporation or authorized to make loans upon pledges or deposits, in the office of the superintendent of banks, and if an insurance corporation in the office of the superintendent of insurance, the documents described in section eighteen of this chapter, and such documents shall be recorded as original certificates of incorporation are required by law to be recorded. The fees for filing and recording such documents, together with the tax, if any, required by law to be paid before the incorporation of a domestic company of the same class, must be paid before filing.

New; formerly L. 1900, ch. 733 § 1.

§ 18. Papers to be filed upon reincorporation. The documents to be filed by any such corporation shall include,

1. A copy of its charter, certificate of incorporation, or other document constituting it a body corporate, with such amendments, if any, as are desired by the corporation or are required by the laws of New York, authen-

ticated as an original certificate of incorporation is required to be authenticated;

2. A declaration of its desire to become a corporation of this state and of its submission to the laws of this state, duly executed by the authority of the body in which its corporate powers are vested.

3. A certificate of the superintendent of that department in which these papers are filed that the charter, certificate of incorporation or other constituent document, with its proposed amendments, if any, as filed, is in all respects consistent with the laws of this state relating to domestic corporations of the same class; that the corporation applicant has complied with all conditions imposed by its laws upon domestic corporations of the same class beginning business in this state, with the exception of any provisions concerning the residence of a majority of the incorporators, trustees, or directors of such corporation; that its name is not the same *with the name of any domestic corporation, nor likely to be confounded with any such name, and that it has paid all fees and taxes due from it to the state, including the tax, if any, imposed by this state upon the original incorporation of a company of the same class.

New; formerly L. 1900, ch. 733, § 2.

§ 19. When reincorporation effected and effect thereof. From the date of filing these documents the corporation shall become and be a corporation of this state, and shall be subject to all the laws of this state applicable to corporations of the same class; but its existence and powers as such corporation shall terminate if it shall fail at any time for one month to maintain an office within the state at which an authorized officer or agent shall be present at all reasonable business hours, prepared to exhibit the books of the company to the proper authorities of this

* So in the original.

state and to receive service of process; or if it shall fail within two years to terminate its corporate existence derived from any other state, by surrender of its charter or by dissolution.

New; formerly L. 1900, ch. 733, § 3.

§ 20. Acquisition of real property in this state by certain foreign corporations. Any foreign corporation doing business in this state and created under the laws of the United States, or of any state or territory thereof, or of any foreign state or nation which borders the United States of America and which by its laws confers similar privileges on corporations created by the laws of the state of New York, may acquire and hold such real property in this state as may be necessary for its corporate purposes in the transaction of its business in this state, and convey the same by deed or otherwise in the same manner as a domestic corporation.

Formerly § 20, L. 1890, ch. 563, as am'd by L. 1892, ch. 687, § 17.

Thus am'd by L. 1910, ch. 68.

This section permits corporations organized under the laws of any State or Territory of the United States to acquire real estate here for its corporate purposes, and convey the same in like manner as a domestic corporation. See *Chautauqua Co. Bk. v. Risley*, 19 N. Y. 369; *Moss v. Averell*, 10 N. Y. 449.

The power of corporations to take and hold property depends upon their charters. The law of this State cannot enlarge or change the powers of a foreign corporation. They are solely those given by the law of domicile. Foreign corporations are permitted by comity to exercise their powers within this State, when not in contravention of our statutes or public policy. In *re Estate of Prime*, 136 N. Y. 347.

Whether a corporation holds real property in excess of the limit permitted by law is a question that can be raised only in a direct proceeding by the State against the corporation. *Barnes v. Suddard*, 117 Ill. 237.

The courts of this State will not interfere with the internal administration of the affairs of a foreign corporation. *Fisher v. Charter Oak Life Ins. Co.*, 52 Super. Ct. 179; *Berford v. N. Y. Iron Mine*, 56 Super. Ct. 236.

Public policy does not forbid transaction of business in this State by a corporation formed in another State by citizens of this State, for the purpose of transacting business here. *Demarest v. Flack*, 128 N. Y. 205.

§ 21. Acquisition by foreign corporation of real property in this state. Any foreign corporation may purchase at a sale upon the foreclosure of any mortgage held by it, or, upon any judgment or decree for debts due it, or, upon any settlement to secure such debts, any real property within this state covered by or subject to such mortgage, judgment, decree or settlement, and may take by devise any real property situated within this state and hold the same for not exceeding five years from the date of such purchase, or from the time when the right to the possession thereof vests in such devisee, and convey it by deed or otherwise in the same manner as a domestic corporation.

Formerly § 13, L. 1890, ch. 563, as am'd by L. 1892, ch. 687, § 18; L. 1894, ch. 136.

By the amendment of 1894 the provision was inserted extending to foreign corporations the right to acquire real property by devise.

Sections 17 and 18 (now §§ 20 and 21) afford no warrant for ignoring the broad and general authority contained in sections 15 and 16. Section 18 (now § 21) may still have an office to perform in limiting the period of time for which a foreign corporation, without a certificate from the Secretary of State, may hold land taken for a debt, or purchased at a sale under a judgment or decree; while the necessity for retaining section 17 (now § 20) is not readily perceived. The foreign corporation, which desires to acquire real property, solely for use connected with the transaction of its business here, must, under section 15, procure the certificate of the Secretary of State as a condition of being permitted to carry on business and, having the certificate, its right to do business as freely as a domestic corporation, necessarily carries with it the recognition of the right to acquire and hold what real property may be necessary for that purpose. Both sections, possibly, were retained in the revision of the corporation laws out of abundant caution. Neither section is a new enactment, but merely the continuation of an existing law. Whatever the reason to be assigned for retaining sections 17 and 18 (now §§ 20 and 21), the provisions of sections 15 and 16 contain an authoritative declaration by the Legislature, and no attempt should be made to refine away their comprehensive meaning. It is not the policy of this State to prevent foreign corporations from acquiring and holding real property here, if desired for the transaction of any lawful business. *Lancaster v. Amsterdam Imp. Co.*, 140 N. Y. 576.

§ 22. Prohibition of banking powers. No corporation, domestic or foreign, other than a corporation formed under or subject to the banking laws of this state or of the United States, except as permitted by such laws, shall by any implication or construction be deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, by receiving deposits, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt for circulation as money, or of engaging in any other form of banking; nor shall any such corporation, except an express company having contracts with railroad companies for the operation of an express service upon the lines of such railroad companies, or a transatlantic steamship company, or a telegraph company, or a corporation incorporated prior to the year eighteen hundred and fifty, to promote the welfare of emigrants, possess the power of receiving money for transmission or of transmitting the same, by draft, traveler's check, money order or otherwise.

Formerly § 14, L. 1890, ch. 563, as am'd by L. 1892, ch. 687, § 19; L. 1904, ch. 236.

Thus am'd by L. 1911, ch. 771.

It is the settled policy of the Legislature to prevent corporations not formed for banking purposes from carrying on, or in any way interfering with the same. *N. Y. Loan & Trust Co. v. Helmer*, 77 N. Y. 64.

§ 23. Qualification of members as voters. Unless otherwise provided in the certificate of incorporation, every stockholder of record of a stock corporation shall be entitled at every meeting of the corporation to one vote for every share of stock standing in his name on the books of the corporation; and at every meeting of a non-stock corporation, every member, unless disqualified by the by-laws, shall be entitled to one vote. The stockholders of a stock corporation, by a by-law adopted by a vote at any annual meeting, or at any special meeting

duly called for such purpose, may prescribe a period, not exceeding forty days prior to meetings of the stockholders, during which no transfer of stock on the books of the corporation may be made. Except in cases of express trust, or in which other provision shall have been made by written agreement between the parties, the record holder of stock which shall be held by him as security, or which shall actually belong to another, upon demand therefor and payment of necessary expenses thereof, shall issue to such pledgor or to such actual owner of such stock, a proxy to vote thereon. No member of a corporation shall sell his vote or issue a proxy to vote to any person for any sum of money or any thing of value. The books and papers containing the record of membership of the corporation shall be produced at any meeting of its members upon the request of any member. If the right to vote at any such meeting shall be challenged, the inspectors of election, or other persons presiding thereat, shall require such books, if they can be had to be produced as evidence of the right of the person challenged to vote at such meeting, and all persons who may appear from such books to be members of the corporation may vote at such meeting in person or by proxy, subject to the provisions of this chapter.

Formerly L. 1890, ch. 563, § 20, part, as am'd by L. 1892, ch. 687; L. 1901, ch. 355. The other parts of former section 20 are now §§ 24 and 25.

As amended in 1901 this section authorizes a provision in the certificate of incorporation to withhold, limit or amplify the voting power of the different classes of stockholders. Prior to this amendment, every stockholder was entitled to one vote for every share of stock held by him, except when the certificate of incorporation provided for cumulative voting. The amended section also empowers stockholders by a by-law to prescribe the time for closing stock books for voting purposes, not exceeding forty days prior to meetings of stockholders. This is in lieu of the former provision which entitled persons who became stockholders at least ten days prior to a stockholders' meeting to vote thereat. The amendment of 1901 further provides that, except in certain specified cases, the real owner or pledgor of stock standing in the name of another is entitled, upon demand and

payment of necessary expenses, to receive a proxy to vote thereon.

As to stock book, inspectors of election and meeting for election of directors, see Stock Corp. Law, §§ 32, 31 and 25, respectively.

As to powers of Supreme Court respecting disputed elections, see § 32 of this law.

Penal Law Provision.

Any person who, being entitled to vote at any meeting of the stockholders or bondholders, or both, of a stock corporation, sells his vote, or who issues a proxy to vote to any person for any sum of money or thing of value, except as expressly authorized by law, is guilty of a misdemeanor. Penal Law, § 668.

Vote, Limitation of Right.

This section is broad enough to permit the incorporators to insert, in the certificate of incorporation, a provision that holders of preferred stock shall be limited in their right to vote concerning matters affecting the management of the corporation, including the election of directors. *Peo. ex rel. Brown v. Koenig*, 133 App. Div. 756.

The phrase "unless otherwise provided in the certificate of incorporation," in the beginning of this section, does not relate only to cumulative voting permitted by section 24, but permits the certificate of incorporation to provide what voting right classes of stockholders shall possess; and it is lawful for different classes of stockholders to agree among themselves, through the certificate of incorporation, that one class shall have no right to vote upon all or certain questions relating to the management of the corporation, and such agreement does not contravene public policy. The Legislature did not intend to compel every class of stockholders to retain the right to vote, or to prohibit formation of a corporation depriving preferred stockholders of voting power. *Peo. ex rel. Browne v. Koenig*, 133 App. Div. 756.

A stockholder's right to vote for directors, once acquired, cannot be divested, even by legislation, as it is a right to protect the property from loss and make it effective in earning dividends, and to deprive him of such right or to so undermine it as to essentially affect its power of protection is to deprive him of an essential attribute of his property involved in the ownership of stock. *Lord v. Equitable Life Assur. Soc.*, 194 N. Y. 212, revsg. 126 N. Y. 937; *Stokes v. Continental Trust Co.*, 186 N. Y. 285.

Married Women May Vote.

Laws of 1851, ch. 231, provided that married women who are stockholders have the same rights at corporate elections as other stockholders. This act was repealed and superseded in 1896 by the Domestic Relations Law (now L. 1909, ch. 19), section 51 of which upon this subject reads as follows:

§ 51. Powers of married woman.—A married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person, including her husband, and to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts, and be liable on such contracts, as if she were unmarried; * * * (Formerly L. 1884, ch. 381, as re-enacted and am'd by Domestic Relations Law of 1896, ch. 272; re-enacted by L. 1909, ch. 19, § 51.)

Since ch. 381, L. 1884 (now Domestic Relations Law, § 51) was enacted all disabilities of a married woman to make valid contracts are removed, and she may now make contracts and bind herself in the same way as a femme sole. Where such a contract is made she is no longer to be considered as acting as the agent of her husband. *O'Connell v. Shera*, 66 App. Div. 467.

The ruling in the case of *People v. Webster*, 10 Wendell 554 (1833), to the effect that when a married woman sues, or is sued, her husband must be joined with her, was superseded by the enactment of ch. 381, Laws of 1884 (now Domestic Relations Law, § 51).

Holding Companies May Vote.

As to such companies, see Stock Corp. Law, § 52, and decisions thereunder.

A corporation which has purchased a majority of the stock of another corporation may vote thereon the same as any other stockholder. *Oelbermann v. N. Y. & Northern R. R. Co.*, 77 Hun 332; *In re Buffalo, N. Y. & Erie R. R. Co.*, 74 St. Rep. 345. Such right does not authorize the corporation to divert business to the injury of the minority stockholders. *Farmers' Loan & Trust Co. v. N. Y. & N. R. R. Co.*, 150 N. Y. 410.

Administrators and Executors.

An administrator or executor may vote at corporate elections, and a formal transfer to him on the books is unnecessary. *Matter of No. Shore S. I. Ferry Co.*, 63 Barb. 556; *Matter of Hastings*, 120 App. Div. 756, 759.

Pledgor and Pledgee.

Until the pledge has been enforced and the title made absolute in the pledgee, and the name has been changed on the corporate books, the pledgor is entitled to vote. *McHenry v. Jewett*, 26 Hun 454, *revsd.* on other grounds, 90 N. Y. 58; *Elyea v. Lehigh Salt Mining Co.*, 45 App. Div. 231, 236; *Lawrence v. Maxwell*, 53 N. Y. 19.

Partner May Vote for the Firm.

One partner of a firm, which owns stock in a corporation, registered on the corporate books in the partnership name, has the power to represent that stock in all matters which relate to it in the usual management of such firm's business, and his

action binds the firm. He may receive and waive notice of stockholders' meetings and vote at such meetings. *Kenton Furnace R. & Mfg. Co. v. McAlpin*, 5 Fed. 737.

Decisions Generally.

Only stockholders of record or those holding proxies are entitled to vote at an election of directors, and the situation is not changed by the fact that no regular stock book was kept; the record of title contained in the stock certificate book is in such case controlling as to the right to vote. *In re Utica Fire Alarm Tel. Co.*, 115 App. Div. 821.

An election will not be set aside on account of a mere informality. *In re M. & H. R. R. Co.*, 19 Wend. 135; *Partridge v. Badger*, 25 Barb. 146.

If votes erroneously rejected would have elected a certain ticket, the election will be set aside. *In re L. I. R. R. Co.*, 19 Wend. 37; *Ex Parte Murphy*, 7 Cow. 153.

No stockholder is bound to vote for a larger number of persons than he chooses. *Vandenburgh v. Broadway Ry. Co.*, 29 Hun 356.

When the regular stock book is not accessible, directors must provide a new one to enable stockholders to exercise their legal rights. *In re The Argus Co. v. Manning*, 138 N. Y. 557; *Socorro M. Mining Co. v. Preston*, 17 Misc. 220.

A shareholder may vote on a measure although personally interested therein. *Gamble v. Queens County Water Works Co.*, 123 N. Y. 91.

§ 24. Cumulative voting. The certificate of incorporation of any stock corporation may provide that at all elections of directors of such corporation, each stockholder shall be entitled to as many votes as shall equal the number of his shares of stock multiplied by the number of directors to be elected, and that he may cast all of such votes for a single director or may distribute them among the number to be voted for, or any two or more of them as he may see fit, which right, when exercised, shall be termed cumulative voting. The stockholders of a corporation heretofore formed, who, by the provisions of laws existing on April thirtieth, eighteen hundred and ninety-one, were entitled to the exercise of such right, may hereafter exercise such right according to the provision of this section.

Formerly part of § 20, L. 1890, ch. 563, as am'd by L. 1892, ch. 687, as am'd by L. 1901, ch. 355. Other parts of former § 20 are now §§ 23 and 25.

The method of cumulative voting above provided for is derived from L. 1875, ch. 611, § 26, which was repealed by L. 1890, ch. 563, and re-enacted by L. 1901, ch. 355.

§ 25. Voting trust agreements. A stockholder may, by agreement in writing, transfer his stock to any person or persons for the purpose of vesting in him or them the right to vote thereon for a time not exceeding five years upon terms and conditions stated, pursuant to which such person or persons shall act; every other stockholder, upon his request therefor, may, by a like agreement in writing, also transfer his stock to the same person or persons and thereupon may participate in the terms, conditions and privileges of such agreement; the certificates of stock so transferred shall be surrendered and canceled and certificates therefor issued to such transferee or transferees in which it shall appear that they are issued pursuant to such agreement and in the entry of such transferee or transferees as owners of such stock in the proper books of said corporation that fact shall also be noted and thereupon he or they may vote upon the stock so transferred during the time in such agreements specified; a duplicate of every such agreement shall be filed in the office of the corporation where its principal business is transacted and be open to the inspection of any stockholder, daily, during business hours.

Formerly part of § 20, added by L. 1901, ch. 355. Other parts of former § 20 are now §§ 23 and 24.

The foregoing provisions authorizing agreements for "pooling" stock or creating "voting trusts," and the issuance of certificates of beneficial interest in lieu of stock deposited with the trustee in pursuance of such agreement were added by L. 1901, ch. 355.

§ 26. Proxies. Every member of a corporation, except a religious corporation, entitled to vote at any meeting thereof may so vote by proxy.

No officer, clerk, teller or bookkeeper of a corporation formed under or subject to the banking law shall act as

proxy for any stockholder at any meeting of any such corporation.

Every proxy must be executed in writing by the member himself, or by his duly authorized attorney. No proxy hereafter made shall be valid after the expiration of eleven months from the date of its execution unless the member executing it shall have specified therein the length of time it is to continue in force, which shall be for some limited period. Every proxy shall be revocable at the pleasure of the person executing it; but a corporation having no capital stock may prescribe in its by-laws the persons who may act as proxies for members, and the length of time for which proxies may be executed.

Formerly L. 1890, ch. 563, § 21, as am'd by L. 1892, ch. 687.

For form of proxy, see post, Form No. 24.

One who issues his proxy for anything of value is guilty of a misdemeanor. See Penal Law, § 668.

Inspectors of election have no power to determine the genuineness of proxies. If they are apparently the acts of stockholders, and regular upon their face, that ends the matter, so far as the inspectors are concerned. In re Cecil, 36 How. Pr. 477. See, also, In re White v. New York State Agl. Soc., 45 Hun 580.

Although a foreign corporation is not directly controlled by this section, this State will not enforce an agreement which in the case of a domestic corporation would be void as a violation of the section relating to a proxy to be voted in New York in violation of its general policy thus declared. Sullivan v. Parks, 69 App. Div. 221.

Proxies need not be under seal. Hankins v. Newell, 46 Vroom (N. J.) 26.

A proxy which merely states the year and month of the election, the day not having been determined when it was signed, is sufficient. In re U. S. Cremation Co., 18 N. Y. Supp. 905, 46 St. Rep. 135; Matter of Townshend, 46 St. Rep. 135.

A proxy need not be a stockholder. In re Lighthall Mfg. Co., 47 Hun 258.

A corporation has no authority to adopt a by-law which requires that proxies must be held by a stockholder, as it is the right of a stockholder to select any person whom he might consider to be desirable for that purpose to vote upon his shares. As the statute creating this right did not impose any restriction whatever upon the stockholder, as to the person he should be at liberty to select, a corporation will not be permitted to restrict the privilege thereby conferred or to declare in its by-laws that it should not be so used. In re Lighthall Mfg. Co., 47 Hun 258.

An irrevocable proxy given to secure a debt is invalid. In re Germicide Co., 65 Hun 606, 48 St. Rep. 294.

§ 27. Challenges. Every member of a corporation offering to vote at any election or meeting of the corporation shall, if required by an inspector of election or other officer presiding at such election or meeting, or by any other member present, take and subscribe the following oath: "I do solemnly swear that in voting at this election I have not, either directly, indirectly or impliedly received any promise or any sum of money or any thing of value to influence the giving of my vote or votes at this meeting or as a consideration therefor." Any person offering to vote as proxy for any other person shall present his proxy and, if so required, take and subscribe the following oath: "I do solemnly swear that I have not, either directly, indirectly or impliedly, given any promise or any sum of money or any thing of value to induce the giving of a proxy to me to vote at this election, or received any promise or any sum of money or any thing of value to influence the giving of my vote at this meeting, or as a consideration therefor." The inspectors or persons presiding at the election may administer such oath, and all such oaths and proxies shall be filed in the office of the corporation.

Formerly § 22, as am'd by L. 1892, ch. 687; L. 1895, ch. 672; L. 1901, ch. 355.

An amendment of 1901, ch. 355, simplified the form of oath to be taken by a challenged voter and conformed the section to the modified provisions of section 23.

For forms under this section, see post, Forms Nos. 25, 26.

For form of oath of inspectors and certificate of result, see post, Forms Nos. 22, 23.

§ 28. Effect of failure to elect directors. If the directors shall not be elected on the day designated in the by-laws, or by law, the corporation shall not for that reason be dissolved; but every director shall continue to hold his office and discharge his duties until his successor has been elected.

Formerly L. 1890, ch. 563, § 18, as am'd by L. 1892, ch. 687, § 23.

Provisions in statutes and by-laws requiring election on a specified

day are directory, and the election may be held at a later day. *Beardsley v. Johnson*, 121 N. Y. 224; *St. George Vineyard Co. v. Fritz*, 48 App. Div. 233.

Officers holding over, at the end of their term of office, and continuing to act are directors de jure until their successors are chosen. *Phila. & Rdg. C. & I. Co. v. Hotchkiss*, 82 N. Y. 474.

Directors are not bound to hold over until their successors are elected. Unless they choose to act, their offices become vacant at the end of the term. *Van Amburgh v. Baker*, 81 N. Y. 46, 82 N. Y. 474 supra.

The continuous neglect of a corporation for a number of years to hold any election of officers affords a proper case for the issue of a mandamus. *People ex rel. Walker v. Albany Hospital*, 11 Abb. Pr. (N. S.) 4. See, also, *People v. Twaddell*, 18 Hun 427; *In re Vandenburg v. Broadway Ry. Co.*, 29 Hun 348.

The fact that for a long period of time a corporation omitted to hold meetings of stockholders for the election of directors does not destroy its corporate existence, even though the omission continues for a period of eight years. (*Geneva Mineral Springs Co., Limited v. Coursey*, 45 App. Div. 268.)

§ 29. Mode of calling special election of directors. If the election has not been held on the day so designated, the directors shall forthwith call a meeting of the members of the corporation for the purpose of electing directors, of which meeting notice shall be given in the same manner as of the annual meeting for the election of directors.

If such meeting shall not be so called within one month, or, if held, shall result in a failure to elect directors, any member of the corporation may call a meeting for the purpose of electing directors by publishing a notice of the time and place of holding such meeting at least once in each week for two successive weeks immediately preceding the election, in a newspaper published in the county where the election is to be held and in such other manner as may be prescribed in the by-laws for the publication of notice of the annual meeting, and by serving upon each member, either personally or by mail, directed to him at his last known post-office address, a copy of such notice at least two weeks before the meeting.

Formerly L. 1890, ch. 563, § 24, as am'd by L. 1892, ch. 687.

Notice of election of directors. Stock Corp. Law, § 25. By-laws regulating election to be published. Gen. Corp. Law, § 11, subd. 5, ante.

Failure to give notice as required by this section is ground for setting the election aside. *Matter of Keller*, 116 App. Div. 58.

§ 30. Mode of conducting special election of directors.

Such meeting shall be held at the office of the corporation, or if it has none, at the place in this state where its principal business has been transacted, or if access to such office or place is denied or cannot be had, at some other place in the city, village or town where such office or place is or was located.

At such meeting the members attending shall constitute a quorum. They may elect inspectors of election and directors and adopt by-laws providing for future annual meetings and election of directors, if the corporation has no such by-laws, and transact any other business which may be transacted at an annual meeting of the members of the corporation.

Formerly L. 1890, ch. 563, § 25, as am'd by L. 1892, ch. 687.

A by-law which provides that "a majority of the stock, present in person or by proxy, at any meeting of the stockholders shall constitute a quorum," does not apply to an election, which is governed by section 20 of Stock Corporation Law. Any number of stockholders, however small their holdings, may elect directors, provided they hold a plurality of stock voted. *Matter of R. T. Ferry Co.*, 15 App. Div. 530, revsg. in part 19 Misc. 409.

As to inspectors, see also § 31 of the Stock Corp. Law. See *In re Lighthall Mfg. Co.*, 47 Hun 258.

§ 31. Qualification of voters and canvass of votes at special election. In the absence at such meeting of the books of the corporation showing who are members thereof, each person, before voting, shall present his sworn statement setting forth that he is a member of the corporation; and if a stock corporation, the number of shares of stock owned by him and standing in his name on the books of the corporation, and, if known to him, the whole number of shares of stock of the corpora-

tion outstanding. On filing such statement, he may vote as a member of the corporation; and if a stock corporation, he may vote on the shares of stock appearing in such statement to be owned by him and standing in his name on the books of the corporation.

The inspectors shall return and file such statements, with a certificate of the result of the election, verified by them, in the office of the clerk of the county in which such election is held, and the persons so elected shall be the directors of the corporation.

Formerly § 26, as am'd by L. 1892, ch. 687.

The right to vote is determined by the transfer books which are conclusive upon the inspectors. See *People v. Tuthill*, 31 N. Y. 550.

For form of inspectors' certificate for filing in county clerk's office, see Form No. 22.

§ 32. Powers of supreme court respecting elections.

The supreme court shall, upon the application of any person or corporation aggrieved by or complaining of any election of any corporation or any proceeding, act or matter touching the same, upon notice thereof to the adverse party, or to those to be affected thereby, forthwith and in a summary way hear the affidavits, proofs and allegations of the parties, or otherwise inquire into the matters or causes of complaint, and establish the election or order a new election, or make such order and give such relief as right and justice may require.

Formerly § 15, L. 1890, ch. 563, as am'd by L. 1892, ch. 687, § 27.

Scope of Section.

This section only authorizes an application to the court to establish or set aside an election in a summary way, and not by mandamus. *Peo. ex rel. Putzel v. Simonson*, 61 Hun 338; *In re The Argus Co. v. Manning*, 138 N. Y. 557.

The court has power to annul the election of an ineligible trustee, and it is not necessary that the Attorney-General should proceed under section 1948 of the Code of Civil Procedure. *Matter of Northern Dispensary*, 26 Misc. 147.

Right to Apply for Relief.

An application will not be granted when made by one who was not a stockholder at the time of the election, but subsequently re-

ceived a certificate of stock from one who took part in it. *Matter of Syracuse, Chenango & N. Y. R. R. Co.*, 91 N. Y. 1.

Where one set of trustees claim to be de facto in office, and have possession of corporate books and assets, and a rival board, claiming to be trustees de jure, are seeking to obtain possession of the corporate assets, a court of equity will interfere. *Model Bldg. & Loan Assn. v. Patterson*, 12 Misc. 400.

The objection upon which proceedings are based should be taken at the time of the election. *In re Lighthall Mfg. Co.*, 47 Hun 258. See also, *Matter of L. I. R. R. Co.*, 19 Wend. 37; *In re U. S. Cremation Co.*, 46 St. Rep. 135; *Vandenburgh v. Broadway Underg. C. Ry. Co.*, 29 Hun 348.

Power of Court.

The court may go behind entries in the transfer book and determine whether a transfer appearing thereon was a sale or only a pledge. *Strong v. Smith*, 15 Hun 222, *affd.*, 80 N. Y. 637; *Matter of Elias*, 17 Misc. 718.

The court cannot compel inspectors to count votes which they have erroneously refused. The only relief is to order a new election if justice requires it. *Peo. ex rel. Putzel v. Simonson*, 61 Hun 338.

When a voter presents his ballot he does all that the law requires him to do. It is then the duty of inspectors to credit him with the votes to which the books show that he is entitled. *Matter of Mutual Fire Ins. Co.*, 51 App. Div. 163.

The fact that qualified persons were permitted to vote after the hour for closing had expired does not vitiate election. *Rudolph v. Southern Beneficial League*, 23 Abb. N. C. 199.

The receipt of illegal votes in favor of one who has received a majority of legal votes cast will not defeat his election. *In re Argus Co. v. Manning*, 138 N. Y. 557.

Where inspectors reject ballots, thereby causing no choice, a new election was properly had. *Peo. ex rel. Thorn v. Pangburn*, 3 App. Div. 456.

Foreign Corporations.

The validity of an election of a foreign corporation will not be determined in this State upon a motion for an injunction, nor does section 1948 of the Code apply to foreign corporations. *Washington Lighting Co. v. Dimmick*, 41 App. Div. 596.

§ 33. Stay of proceedings in actions collusively brought. If an action is brought against a corporation by the procurement or default of its directors, or any of them, to enforce any claim or obligation declared void by law, or to which the corporation has a valid defense, and such action is in the interest or for the benefit of any director, and the corporation has by his connivance

made default in such action, or consented to the validity of such claim or obligation, any member of the corporation may apply to the supreme court, upon affidavit, setting forth the facts, for a stay of proceedings in such action, and on proof of the facts in such further manner and upon such notice as the court may direct, it may stay such proceedings or set aside and vacate the same, or grant such other relief as may seem proper, and which will not injuriously affect an innocent party, who, without notice of such wrongdoing and for a valuable consideration, has acquired rights under such proceedings.

Formerly L. 1890, ch. 563, § 16, as am'd by L. 1892, ch. 687, § 28.

A stay of proceedings will not be granted unless it is shown that actions were collusively brought in the pecuniary interest of a director. *Matter of Gardner*, 86 Hun 30.

Where a judgment is collusively obtained, a stockholder is entitled to an order vacating the judgment. *Matter of Virgil*, 26 Misc. 320.

When resident stockholders may maintain action to restrain foreign corporation. *Ives v. Smith*, 28 St. Rep. 917. See *Rogers v. Phelps*, 31 St. Rep. 872.

§ 34. Quorum of directors and powers of majority. The affairs of every corporation shall be managed by its board of directors, at least one of whom shall be a resident of this state. Unless otherwise provided a majority of the board of directors of a corporation at a meeting duly assembled shall be necessary to constitute a quorum for the transaction of business and the act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors. The members of a corporation may in by-laws fix the number of directors necessary to constitute a quorum at a number less than a majority of the board, but at least equal to one-third of its number. Subject to the by-laws, if any, adopted by members of a corporation, the directors may make necessary by-laws of the corporation.

Formerly L. 1890, ch. 563, § 29, as am'd by L. 1892, ch. 687; L. 1901, ch. 214; L. 1904, ch. 737.

Prior to the Consolidation Act (L. 1909, ch. 28), the second sentence in this section began thus: "Unless otherwise provided (by law) a majority of the board of directors," etc., the words "by law" having been dropped in the act of 1909.

The last sentence but one was inserted by L. 1904, ch. 737.

A majority of a quorum of the board may act. Gen. Corp. Law, § 43, post. Stockholders may make by-laws. Gen. Corp. Law, § 11, subd. 5. Effect of failure to adopt certain by-laws. Stock Corp. Law, § 27. Election, qualification and classification of directors. Stock Corp. Law, § 25. Change of number of directors. Stock Corp. Law, § 26.

Powers of Directors.

All powers directly conferred by statute, or impliedly granted, of necessity, must be exercised by the directors who are constituted by the law as the agency for the doing of corporate acts. *Beveridge v. N. Y. Elev. R. R. Co.*, 112 N. Y. 22; *Leslie v. Lorillard*, 110 N. Y. 519; *People's Bank v. St. Anthony R. C. Church*, 109 N. Y. 512.

Directors are authorized to manage the business of the corporation, audit and pay its debts, and make contracts within the ordinary scope and business of the corporation. *Kelsey v. Sargent*, 40 Hun 150.

One dealing with an officer of a corporation who assumes to act for it in matters in which the interests of the corporation and its officers are adverse is put upon inquiry as to the authority and good faith of the officer. *McCloskey v. Goldman*, 62 Misc. 462, and cases therein cited.

It is only where the statute or the by-laws require it that co-operation of stockholders is needed. *Beveridge v. N. Y. El. R. R. Co.*, 112 N. Y. 1; *Dabney v. Stevens*, 40 How. Pr. 341; *Sheridan Elec. L. Co. v. Chatham Nat. Bank*, 127 N. Y. 517, affg. 52 Hun 580.

Where a corporation consists of a small number of persons, it may transact business without the formality of resolutions. *Hall v. Herter Brothers*, 83 Hun 19.

Courts will not, at the instance of a stockholder assailing the acts of directors, interfere unless the powers have been illegally exercised, or unless it be shown that the acts were fraudulent or collusive and destructive of the rights of the stockholders. Mere errors of judgment are not sufficient as grounds for court interference as the powers of directors are largely discretionary. *Hennessy v. Muhleman*, 40 App. Div. 175; *Leslie v. Lorillard*, 110 N. Y. 519.

Directors have an absolute right to inspect the corporate books. *Peo. ex rel. Leach v. Central Fish Co.*, 117 App. Div. 77.

The acts of de facto directors are valid. *Lord v. Equitable Life Ins. Co.*, 57 Misc. 417, affd., 126 App. Div. 937, affd., 194 N. Y. 225.

Where it can be proven that proposed acts of directors are in

the interest of majority stockholders only and in wanton disregard of the rights of the minority the court will restrain them by injunction. *Robinson v. New York, W. & B. Ry. Co.*, 123 App. Div. 339.

Meetings of Directors.

Neither stockholders nor directors can do a corporate act, out of the jurisdiction creating the corporation, which can bind those who do not participate in it. *Ormsby v. Vermont Copper Mining Co.*, 56 N. Y. 623. But meetings of directors of corporations organized under or subject to the provisions of the Business Corporations Law may be held outside the State unless otherwise expressly provided in the certificate of incorporation or in the by-laws. Bus. Corp. Law, § 2, added by L. 1904, ch. 446.

The collective authority of the directors, acting as a board, is necessary, in order to bind the corporation by the action of the directors. *Cammeyer v. Churches*, 2 Sandf. Ch. 186; *Constant v. Rector*, 4 Daly 305.

Directors have no separate or individual authority to bind the corporation, and this, although a majority of the whole number acting singly and not collectively as a board should assent to the particular transaction. Such action must be taken at a meeting of the board. *People's Bank v. St. Anthony's Church*, 109 N. Y. 512, affg. 39 Hun 498.

Directors Cannot Vote by Proxy.

No director can vote at a meeting of the board of directors by proxy. *Craig Med. Co. v. The Merchants' Bank of Rochester*, 59 Hun 561.

Executive Committee, Powers of.

The board of directors may appoint an executive committee of its own members with power to transact its business during the intervals between the meetings of the board. *Olcott v. Tioga R. R. Co.*, 27 N. Y. 546; *Com'l Wood & Cement Co. v. Northampton Cement Co.*, 190 N. Y. 1.; *Sheridan Elec. L. Co. v. Chatham Nat. Bank*, 127 N. Y. 517; *First Nat. Bank v. Com'l Travelers' Home Assn.* 108 App. Div. 78, affd., 185 N. Y. 575. Even though such business involves the giving of negotiable notes for corporate indebtedness. *Id.*

The board may delegate its authority to agents, or to a quorum composed of less than a majority of the number. *Hoyt v. Thompson's Executor*, 19 N. Y. 207.

Where directors appointed an executive committee, giving it no power to issue stock, and thereafter stock was issued by the president of the corporation under the authority of such committee and the board of directors neither authorized nor ratified such issue, no title was conferred upon one who was not a purchaser in good faith for full value. *Ryder v. Bushwick R. R. Co.*, 134 N. Y. 83.

Directors, Relation of, to Corporation and Others.

The officers cannot, by resigning in a body, deprive themselves of their authority over the corporate property nor free themselves from the obligation to care for it until others are elected in their stead. *Zeltner v. Zeltner Brewing Co.*, 79 App. Div. 136, *affd.*, 174 N. Y. 247.

Any resolution passed at a meeting at which a director having a personal interest in the matter voted is voidable without regard to its fairness when the vote of that director was necessary to the result. *Miller v. Crown Perfumery Co.*, 57 Misc. 383, *affd.*, 125 App. Div. 881.

A director or officer of a corporation is not precluded from entering into contracts with it for his personal benefit where the rights of the corporation are fully protected. *Veeder v. Horstmann*, 85 App. Div. 154. Such contracts, especially where the corporation is represented by a majority of the directors, exclusive of the party interested, are not void, but are simply voidable at the suit of the corporation or persons claiming through it. *Id.*

As in the case of every other trustee or agent, no director can, in acting on behalf of the corporation, reserve or secure to himself any advantage or benefit. *Koster v. Pain*, 41 App. Div. 443. However, agreements openly made, to the knowledge of all the stockholders, are valid. *Goldshear v. Barron*, 42 Misc. 198.

Liabilities of Directors.

Directors of a corporation, owning substantially all its stock, do not own the corporation itself, and for converting its property to their own use the same liability attaches as if they had appropriated property of an individual, as the corporation is a distinct legal entity. *Saranac & Lake Placid R. R. Co. v. Arnold*, 167 N. Y. 368; *Buffalo Loan, Trust & Safe Deposit Co. v. Medina Gas & Elec. Lt. Co.*, 162 N. Y. 67.

Directors are bound to manage the corporate property and affairs in good faith, and for a violation of duty resulting in waste of assets, injury to its property or unlawful gain to themselves, they are liable to account to the corporation or its representatives. *Bosworth v. Allen*, 168 N. Y. 157, *revsg.* 57 App. Div. 633.

Directors who have transferred all the property of a corporation without providing for the payment of an outstanding judgment are personally liable to the creditor. *Darcy v. Brooklyn & N. Y. Ferry Co. et al.*, 127 App. Div. 167.

Directors are not liable for losses caused by mere errors of judgment. *Peo. v. Equitable Life Ass. Soc.*, 124 App. Div. 714.

Resignation of Directors.

Where all the officers and all the directors of an insolvent corporation resign for the purpose of procuring the appointment of a receiver under the Code, § 1810, subd. 3, authorizing

an action "to preserve the assets of a corporation having no officers to hold the same," such resignations are neither legal or effective. The provision was not designed to permit officers to abdicate their functions for the purpose of shifting their burdens to the courts. *Zeltner v. Zeltner Brewing Co.*, 174 N. Y. 247; *Yorkville Bank v. Same*, 80 App. Div. 578, appeal dismissed, 178 N. Y. 572.

The acceptance of the resignation of a director of a corporation is ordinarily not essential to its effectiveness. *Manhattan Co. v. Kaldenberg*, 165 N. Y. 1, revsg. 27 A. D. 31; *Noble v. Euler*, 20 App. Div. 548; *Wilson v. Brentwood Hotel Co.*, 16 Misc. 48, and cases cited supra.

The acceptance by the board of directors of the resignation of a duly elected director, after he had withdrawn the same, and a refusal to recognize him as a director, does not authorize the court to enjoin him from acting, nor to compel the recognition of the rival claimant. *Moir v. Provident Savings Life Assur. Soc.*, 127 App. Div. 591.

Removal of a Director.

Respecting the removal of a director for misconduct, etc., see Gen. Corp. Law, §§ 90, 91, and notes thereunder.

In the absence of any specific authority or provisions in the certificate of incorporation, or in by-laws duly adopted by the stockholders, directors have no power to expel a fellow director from the board, and, hence, no power to pass a valid amendment to the by-laws under which they may assume to exercise that power. *Raub v. Gerken*, 127 App. Div. 42; *Peo. ex rel. Manice v. Powell*, 201 N. Y. 194.

Re-election of directors after alleged misconduct does not prevent removal as their terms of office are treated as continuous. *Peo. v. Lyon*, 119 App. Div. 361, *affd.*, 189 N. Y. 544.

Compensation of Directors.

The general rule is that a director, assuming office as such without any agreement as to compensation, is presumed to render his official services gratuitously; for he assumes thereby, in a sense, a trust relation toward the company, and it would be against public policy to permit him to assert claims for services which were within the line of his duties. *Bagley v. Carthage, Watertown & S. H. R. R. Co.*, 165 N. Y. 179.

Directors are not entitled to compensation even for services outside of the ordinary duties of their offices, unless it is expressly stipulated before the services are rendered; but an express contract by the board to pay a fixed or reasonable sum is binding. *Kelsey v. Sargent*, 40 Hun, 150, 156.

It is well settled that a director is not entitled to compensation for services performed by him, as such, without the aid of a pre-existing provision expressly giving the right to it. *Mather v. Eureka Mower Co.*, 118 N. Y. 629.

The president and director of a corporation who renders services outside of his official duties, upon an employment of the directors with a promise of compensation, is entitled to re-

ceive payment therefor and the expenses incurred, although the by-laws omit to provide a salary for his official services and there is no express resolution of the board of directors containing an agreement to employ and to compensate him. *Bagley v. Carthage, Watertown & S. H. R. R. Co.*, supra. It may often happen, from the nature of the business to be done, that it is essentially preferable and advantageous to employ a director. *Id.* See, also, *Bogart v. N. Y. & L. I. R. R. Co.*, 118 App. Div. 50, *affd.*, 191 N. Y. 550.

The fact that an officer of the corporation voted in favor of giving himself a salary does not render such contract void, but only voidable at the instance of the corporation, or one whose interests are concerned. *Keans v. N. Y. & College Point Ferry Co.*, 17 Misc. 272, *affd.*, 19 Misc. 19. See, also, *Miller v. Crown Perfumery Co.*, 57 Misc. 383, *affd.*, 125 App. Div. 881.

Contracts of Directors with the Corporation.

The general rule is, that acts of corporate officers, in any transaction in which both the corporation and they as individuals are interested, do not bind the corporation, except in favor of innocent parties, unless such acts are specially authorized or ratified by the corporation. *McCloskey v. Goldman*, 62 Misc. 462; *Clafin v. Farmers' & Citizens' Bank*, 25 N. Y. 293.

A contract of a director with his corporation is not necessarily void, although it is always subject to the strictest scrutiny by the courts. *Vennoli v. Sixty-seven St., Atelier Bldg.*, 55 Misc. 222.

A contract made by a director with the corporation is not void, but merely voidable, in case he fails to show that it was fair, and that no undue advantage was taken of his position. *Sage v. Culver*, 147 N. Y. 241; *Barr v. N. Y., L. E. & W. R. R. Co.*, 125 N. Y. 263.

If the contract is just, and all of the stockholders are competent to assent, and do so, with full knowledge of its terms, it is binding on the corporation. *Welch v. Importers & Traders' Nat. Bank*, 122 N. Y. 177.

Delay in moving to set aside a voidable contract may be deemed equivalent to ratification. *Barr v. N. Y., L. E. & W. R. R. Co.*, 125 N. Y. 263.

A director may loan money to the corporation and receive mortgage security for his debt. *Preston v. Loughran*, 58 Hun 210; *Kinsman v. Fiske*, 83 Hun 494. A director may purchase the corporate property at a foreclosure sale. *Harpending v. Munson*, 91 N. Y. 650.

A director can only become the purchaser of property of the corporation subject to its right to elect to disaffirm the sale and demand a resale. *Hoyle v. Plattsburgh & Montreal R. R. Co.*, 54 N. Y. 329.

An owner of property may sell it to a corporation of which he is a stockholder and trustee, if he does not, while acting in his own interests, also act as trustee or representative of the corporation. *Gamble v. Q. C. W. Co.*, 123 N. Y. 91; *Flynn v. Brooklyn City R. R. Co.*, 9 App. Div. 269, *affd.*, 158 N. Y. 493.

Directors have no authority to bind the company by any contract made with themselves personally, or to represent it in any transaction with third parties in which they have a private interest at stake. *Wardell v. Union Pac. R. R. Co.*, 103 U. S. 651; *Hoyle v. Plattsburgh R. R. Co.*, 54 N. Y. 315.

Rights of Stockholders.

It is the duty of a stockholder, if he desires to set aside acts of the corporation, to act promptly, and in failing to do so he is estopped from asserting any right as against a person acting in good faith. *Drake v. N. Y. Suburban Water Co.*, 26 App. Div. 499; *Atlantic Trust Co. v. N. Y. C. S. W. Co.*, 75 App. Div. 354.

A contract pertaining to the ordinary affairs of a corporation made by its directors cannot be revoked by the stockholders. *Genesee Valley & Wyoming Ry. Co. v. Retsof Mining Co.*, 15 Misc. 187.

If officers do an unauthorized act or incur indebtedness which would not create a corporate liability, the stockholders may ratify the acts and validate the transaction. *Martin v. Niagara F. P. Co.*, 122 N. Y. 172, affg. 44 Hun 130; *First Nat. Bk. v. Com'l Travelers' Home Assn.*, 108 App. Div. 78, aff'd 185 N. Y. 575.

A stockholder cannot enjoin the execution of a contract made by his corporation, with another corporation, within the corporate powers and free from fraud, on the sole ground that the promoters of the contract were directors in both corporations. *Burden v. Burden*, 159 N. Y. 287.

When one corporation obtains control of the board of directors of another corporation, and, thereafter, without consideration, obtains the property of the latter, and so arranges its affairs as to render all its stock, other than that held by the controlling corporation, valueless, a stockholder of the corporation which has been thus despoiled may maintain an action to redress the wrong done to his company. *Pondir v. N. Y., L. E. & W. R. R. Co.*, 72 Hun 385; *Farmers' Loan & Trust Co. v. N. Y. & Northern Ry. Co.*, 150 N. Y. 410; *Sage v. Culver*, 147 N. Y. 241; *Barr v. N. Y., L. E. & W. R. R. Co.*, 96 N. Y. 444.

A court will not interfere with the control of a corporation by its directors and a majority of its stockholders, although the directors may have acted unwisely and not for the best interest of the corporation, unless it is shown that the action of the governing body has been so clearly against the interests of minority stockholders as to amount to a wanton and fraudulent destruction of the rights of such minority. *Hart v. Ogdensburg & Lake Champlain R. R. Co.*, 89 Hun 316; *Gamble v. Queens Co. Water Co.*, 123 N. Y. 91; *Flynn v. Brooklyn City R. R. Co.*, 9 App. Div. 269, affd., 158 N. Y. 493; *Lewisohn Bros. v. Anaconda Copper Mining Co.*, 26 Misc. 613; *Beveridge v. N. Y. E. R. R. Co.*, 112 N. Y. 1; *Leslie v. Lorillard*, 110 N. Y. 519; *Hawkes v. Oakland*, 104 U. S. 450.

§ 35. **Directors as trustees in case of dissolution.** Upon the dissolution of any corporation, its directors, unless

other persons shall be appointed by the legislature, or by some court of competent jurisdiction, shall be the trustees of its creditors, stockholders or members, and shall have full power to settle its affairs, collect and pay outstanding debts, and divide among the persons entitled thereto the money and other property remaining after payment of debts and necessary expenses.

Such trustees shall have authority to sue for and recover the debts and property of the corporation, by their name as such trustees, and shall jointly and severally be personally liable to its creditors, stockholders or members, to the extent of its property and effects that shall come into their hands.

Formerly L. 1890, ch. 563, § 30, as am'd by L. 1892, ch. 687.

The foregoing section empowers directors to act as trustees for settlement of its affairs in case of the termination of corporate existence by limitation, or in case of dissolution, when no others are appointed to act as trustees for the purpose of winding up its affairs.

For proceedings for the dissolution of corporations without making application to the court, see §§ 220 and 221 of the General Corporation Law.

For provisions as to judicial proceedings for voluntary and involuntary dissolutions, see Articles 6, 8 and 9, post.

Dissolution, How Effected.

The dissolution of a corporation may occur as the result (1) of an action brought pursuant to Gen. Corp. Law, § 101 or § 131; (2) a judicial proceeding for voluntary dissolution pursuant to Gen. Corp. Law, Article 9; (3) voluntary dissolution without judicial proceedings pursuant to Gen. Corp. Law, Article 10; (4) termination of the corporate existence by limitations contained in the charter or by self-executing statutory provisions.

The above section does not apply to dissolution under 1, 2 and 3, supra, for in those cases the court appoints a permanent receiver and such receiver becomes the trustee by virtue of Gen. Corp. Law, § 231, which makes permanent receivers trustees of the property for the benefit of the creditors of the corporation and of its stockholders.

In case of a dissolution without judicial proceedings the corporation itself is kept alive by subdivision 3 of section 221, and where there is an unliquidated claim against the corporation which can only be liquidated by a judgment an action should be prosecuted against the corporation and not against its trustees alone. *Cunningham v. Glauber*, 133 App. Div. 10, affg. 61 Misc. 443.

As to the survival of actions against corporations dissolved without judicial proceedings, see Gen. Corp. Law, § 221, post.

When Corporation is Dissolved.

When the term of existence of a corporation expires no dissolution by the court is necessary. *Sturges v. Vanderbilt*, 73 N. Y. 384; *Peo. v. Walker*, 17 N. Y. 503.

Upon the expiration of the charter, the title to the corporate property vests in the directors then in office, in trust for the creditors and stockholders. *Cent'l City Savings Bank v. Walker*, 66 N. Y. 424. See *Long I. F. Co. v. Terbell*, 48 N. Y. 427; *Peo. ex rel. Haberman v. James*, 5 App. Div. 412.

Upon the dissolution of a corporation, its real property does not revert to the grantors, but passes to the trustees under this section. *Heath v. Barmore*, 50 N. Y. 302.

Liability of Directors.

Upon dissolution of a corporation, its directors become vested with the title to its property and responsible for the value thereof. *Peo. v. O'Brien*, 111 N. Y. 1.

This section expressly limits the liability of directors as trustees to the extent of the property and effects that come into their hands. *Hoffman v. Van Nostrand*, 42 Barb. 174.

Foreign Corporations.

An action brought against a foreign corporation which is subsequently dissolved, and a liquidator appointed under the laws of the foreign State, who thereby becomes vested with all the powers of the existing trustees, cannot be continued against such trustees, under section 757 of the Code of Civil Procedure, where it is not alleged that there is in the State of New York, or that they have in their possession, any property of the corporation. *Wamsley v. Horton & Co.*, 12 App. Div. 312, *affd. on op. below*, 153 N. Y. 687.

This section has no application in the case of a foreign corporation, where the laws of the State in which it was incorporated provide for a continuance of its existence after the expiration of its charter for the purpose of bringing actions to collect debts due to it, as such continued existence will be recognized by the courts of this State. *O'Reilly, Skelly & Fogarty Co. v. Greene*, 18 Misc. 423.

§ 36. Forfeiture for non-user. If any corporation, except a railroad, turnpike, plank-road or bridge corporation, shall not organize and commence the transaction of its business or undertake the discharge of its corporate duties within two years from the date of its incorporation, its corporate powers shall cease.

Formerly L. 1890, ch. 563, § 21, as am'd by L. 1892, ch. 687, § 30.

By L. 1892, ch. 687, the period within which a corporation is compelled to exercise a user of its corporate rights and franchises was changed from one year to two years.

Forfeiture Must be Adjudicated.

A corporation omitting to perform a duty imposed by charter or to comply with its provisions does not ipso facto cease to be a corporation, but simply exposes itself to the hazard of being deprived of its franchises by action instituted by the Attorney-General. *Brooklyn Steam Transit Co. v. Brooklyn*, 78 N. Y. 529; *Day v. Ogdensburg & Lake Champlain R. R. Co.*, 107 N. Y. 129.

An action against a corporation to obtain an adjudication that its corporate powers have ceased, as provided in this section, may be maintained by the Attorney-General under the Code, § 1798 (now Gen. Corp. Law, § 131). *Peo. ex rel. Hearst v. Ramapo Water Co.*, 51 App. Div. 145.

The State may, by legislative enactment, waive forfeitures and recognize the existence of a corporation and may also grant it other and further powers. *Bohmer v. Haffen*, 22 Misc. 565, *affd.*, 35 App. Div. 381, *affd.*, 161 N. Y. 390; *Matter of N. Y. El. R. R. Co.*, 70 N. Y. 327.

§ 37. **Extension of corporate existence.** Any domestic corporation at any time before the expiration thereof, may extend the term of its existence beyond the time specified in its original certificate of incorporation, or by law, or in any certificate of extension of corporate existence, by the consent of the stockholders owning two-thirds in amount of its capital stock, or if not a stock corporation, by the consent of two-thirds of its members, which consent shall be given either in writing or by vote at a special meeting of the stockholders called for that purpose, upon the same notice as that required for the annual meetings of the corporation; and a certificate under the seal of the corporation that such consent was given by the stockholders in writing, or that it was given by vote at a meeting as aforesaid, shall be subscribed and acknowledged by the president or a vice-president, and by the secretary or an assistant secretary of the corporation, and shall be filed in the office of the secretary of state, and shall by him be duly recorded and indexed in a book specially provided therefor, and a certified copy of such certificate, with a certificate of the secretary of state of such filing and record, or a duplicate original of such certificate, shall be filed and simi-

larly recorded and indexed in the office of the clerk of the county wherein the corporation has its principal place of business, and shall be noted in the margin of the record of the original certificates of such corporation, if any, in such offices, and thereafter the term of the existence of such corporation shall be extended as designated in such certificate.

The certificate of incorporation of any corporation whose duration is limited by such certificate or by law, may require that the consent of the stockholders owning a greater percentage than two-thirds of the stock, if a stock corporation, or of more than two-thirds of the members, if a non-stock corporation, shall be requisite to effect an extension of corporate existence as authorized by this section.

Part of former § 32, as am'd by L. 1892, ch. 687; L. 1900, ch. 177; L. 1901, ch. 355; L. 1905, ch. 256. The other parts of former § 32 are now §§ 38, 39, 40, and 41.

For form of certificate of extension of existence, see Form No. 36.

As amended in 1901, this section provides that the extension of existence may be made at any time before the expiration of the charter, and that the consent may be in writing, or may be given at a special meeting of the stockholders called for that purpose. These two alternative methods are in lieu of the former provision whereby the extension could only be effected by the filing of a written consent, within three years before the expiration of the corporate existence.

§ 38. Revival of corporate existence. If the term of existence of any domestic corporation shall have expired and. it shall be made satisfactorily to appear to the supreme court that such corporation was legally organized pursuant to any law of this state, and that it shall have issued its bonds payable at a date beyond the date fixed in its charter or certificate of incorporation for the expiration of its corporate existence, and such bonds shall be unmatured and unpaid, or, if a bank, incorporated under a general law of this state, that shall have issued any other obligations or shall have incurred any other indebtedness which at the date of the application

shall be unsatisfied or unpaid, the supreme court may, upon the application of any person interested and upon such notice to such other parties as the court may require, by order, authorize the filing and recording of a certificate reviving the existence of such corporation, upon such conditions and with such limitations as such order shall specify, and extending such corporate existence for a term not exceeding the term for which it was originally incorporated. Upon filing and recording such certificate in the same manner as certificates of extension of corporate existence duly issued before the expiration of the existence of a domestic corporation are authorized by law to be filed and recorded, such corporate existence shall be revived and extended in pursuance of the terms of such order, but such revival and extension shall not affect any litigation commenced after such expiration and pending at the time of such revival.

Part of former § 32, as am'd by L. 1892, ch. 687; L. 1900, ch. 177; L. 1901, ch. 355; L. 1905, ch. 256. The other parts of former § 32 are now §§ 37, 39, 40, and 41.

Thus am'd by L. 1911, ch. 63.

§ 39. Approval of certificates of extension or revival; when required. In the case of a corporation formed under or subject to the banking law, no certificate of extension or revival shall be filed or recorded unless it shall have indorsed thereon the written approval of the superintendent of banks; or, if an insurance corporation, unless it shall have indorsed thereon the written approval of the superintendent of insurance; and, if a turnpike or bridge corporation, it shall not be filed unless it shall have indorsed thereon or annexed thereto a certified copy of a resolution of the board of supervisors of each county in which such turnpike or bridge is located, approving of and authorizing such extension.

Part of former § 32, as am'd by L. 1892, ch. 687; L. 1900, ch. 177; L. 1901, ch. 355; L. 1905, ch. 256. The other parts of former § 32 are now §§ 37, 38, 40, and 41.

§ 40. Extension when stock is owned by another corporation. If all the stock of a corporation other than a corporation formed under or subject to the banking law, or an insurance corporation, or a turnpike, plank-road or bridge corporation shall be lawfully owned by another stock corporation entitled by law to take a surrender and merger thereof, the corporate existence of such corporation whose stock is so owned may be extended at any time for the term of the corporate existence of the possessor corporation, by filing in the office or offices in which the original certificate or certificates of incorporation of the first-mentioned corporation were filed a certificate of such extension executed by its president and secretary and by such corporation owning all the shares of its capital stock.

Part of former § 32, as am'd by L. 1892, ch. 687; L. 1900, ch. 177; L. 1901, ch. 355; L. 1905, ch. 256. The other parts of former § 32 are now §§ 37, 38, 39, and 41.

§ 41. Effect of extension. Every corporation extending its corporate existence under this chapter or under any general law of the state shall thereafter be subject to the provisions of this chapter and of such general law, notwithstanding any special provisions in its charter, and shall thereafter be deemed to be incorporated under the general laws of the state relating to the incorporation of a corporation for the purpose of carrying on the business in which it is engaged, and shall be subject to the provisions of such law.

Part of former § 32, as am'd by L. 1892, ch. 687; L. 1900, ch. 177; L. 1901, ch. 355; L. 1905, ch. 256. The other parts of former § 32 are now §§ 37, 38, 39, and 40.

§ 42. When notice of lapse of time unnecessary. Whenever under the provisions of any of the corporate laws a corporation is authorized to take any action after notice to its members or after the lapse of a prescribed period of time, such action may be taken without notice

and without the lapse of any period of time, if such action be authorized or approved, and such requirements be waived in writing by every member of such corporation, or by his attorney thereunto authorized.

Formerly § 38, added by L. 1895, ch. 672.

The right to notice of a corporate meeting may be waived. *Kenton Furnace R. & Mfg. Co. v. McAlpin*, 5 Fed. 737 (1880). And notice will be deemed to have been waived if each stockholder attends and participates in the action of the meeting. In such case they are estopped from denying its legality for want of notice. *Id.*

For form of waiver of notice by stockholders, see post, Forms Nos. 21 and 46, respectively.

§ 43. As to acts of directors. Whenever, under the provisions of any of the corporate laws, a corporation is authorized to take any action by the agreement or action of its directors, managers or trustees, such agreement or action may be taken by such directors, regularly convened as a board, and acting by a majority of a quorum, except when otherwise expressly required by law or by the by-laws of the corporation and any such agreement shall be executed in behalf of the corporation by such officers as shall be designated by the board of directors, managers or trustees. At any meeting at which every member of the board of directors shall be present, though held without notice, any business may be transacted which might have been transacted if the meeting had been duly called. Except when otherwise required by law or the by-laws of the corporation, special meetings of the members of the corporation may be called in the same manner as the annual meeting thereof.

Formerly § 39, added by L. 1895, ch. 672, as am'd by L. 1901, ch. 355.

The amendment of 1901, ch. 355, consisted of the addition of the last two sentences.

§ 44. Political contributions prohibited; penalty. No corporation or joint-stock association doing business in this state, except a corporation or association organized or maintained for political purposes only, shall directly

or indirectly pay or use or offer, consent or agree to pay or use any money or property for or in aid of any political party, committee or organization, or for, or in aid of, any corporation, joint-stock or other association organized or maintained for political purposes, or for, or in aid of, any candidate for political office or for nomination for such office, or for any political purpose whatever, or for the reimbursement or indemnification of any person for moneys or property so used. Any officer, director, stockholder, attorney or agent of any corporation or joint-stock association which violates any of the provisions of this section, who participates in, aids, abets or advises or consents to any such violation, and any person who solicits or knowingly receives any money or property in violation of this section, shall be guilty of a misdemeanor and punishable by imprisonment in a penitentiary or county jail for not more than one year and a fine of not more than one thousand dollars. No person shall be excused from attending and testifying, or producing any books, papers or other documents before any court or magistrate, upon any investigation, proceeding or trial, for a violation of any of the provisions of this section, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding.

Formerly § 41, added by L. 1906, ch. 239.

ARTICLE 3

* Change of Name

Section 60. Petition by corporation to change name.

61. Contents of petition.

62. Notice of presentation of petition.

63. Order authorizing change.

64. When change to take effect.

65. Substitution of new name in pending action or proceeding.

§ 60. Petition by corporation to change name. A petition to assume another corporate name may be made by a domestic corporation, whether incorporated by a general or special law, to the supreme court at a special term thereof, held in the judicial district in which its principal business office shall be situated, or, if it be other than a stock corporation, at a special term held in the judicial district in which its certificate of incorporation is filed or recorded, or in which its principal property is situated, or in which its principal operations are or theretofore have been conducted. If it be a banking, insurance or railroad corporation, the petition must be authorized by a resolution of the directors of the corporation, and approved, if a banking corporation, by the superintendent of banks; if an insurance corporation, by the superintendent of insurance, and if a railroad corporation, by the public service commission. The petition to change the name of any other corporation must have annexed thereto a certificate of the secretary of state, that the name which such corporation proposes to assume is not the name of any other domestic corporation or a name which he deems so nearly resembling it, as to be calculated to deceive.

Formerly § 2411, Code Civ. Pro. Thus am'd by L. 1910, ch. 296.

*CONSOLIDATORS' NOTE.—Code Civ. Pro. §§ 2411 to 2416 have been consolidated in this article so far as they relate to change of name of a corporation. The portions of these sections relating to the change of the name of an individual have been left in the Code of Civil Procedure. The last sentence has been omitted from section 63, because consolidated in County Law, § 161, subd. 6.

§ 61. Contents of petition. The petition must be in writing, signed by the petitioner and verified in like manner as a pleading in a court of record, and must specify the grounds of the application, its present name, and the name it proposes to assume, which must not be the name of any other corporation, or a name so nearly resembling it as to be calculated to deceive; and if it be a railroad corporation, a corporation having banking powers or the power to make loans upon pledges or deposits, or to make insurances, that the petition has been duly authorized by a resolution of the directors of the corporation and approved by the proper officer.

Formerly part of § 2412, Code Civ. Pro. The other part of said section remains in the Code.

§ 62. Notice of presentation of petition. If the petition be made by a corporation located elsewhere than in the city and county of New York, notice of the presentation thereof shall be published once in each week for three successive weeks in a newspaper of every county in which such corporation shall have a business office, or if it has no business office, of the county in which its principal corporate property is situated, or in which its operations are or theretofore have been principally conducted, which newspaper, if it be a banking corporation, shall be designated by the superintendent of banks, if an insurance corporation, by the superintendent of insurance, or if a railroad corporation, by the public service commission. In the city and county of New York such notice shall be published once in each week for three successive weeks in two daily newspapers published in such county. If the petition be made by a domestic corporation organized under or subject to the religious or membership corporations law the court may dispense with the publication of the notice of the presentation of

such petition or require notice of such presentation to be given to such persons and in such manner as the court thinks proper. A copy of the petition and notice of motion shall be filed with the secretary of state, and the proposed name shall thereupon be reserved for said corporation until three weeks after the date of such motion, and until three weeks after the date of any adjournment of such motion if notice of such adjournment shall be filed with the secretary of state, and no certificate of incorporation of a proposed corporation, having the same name as the name proposed in such petition, or a name so nearly resembling it as to be calculated to deceive, shall be filed in any office for the purpose of effecting its incorporation, and no corporation formed without the state of New York having the same name or a name so nearly resembling it as to be calculated to deceive shall be given authority to do business in this state.

Formerly § 2413, Code Civ. Pro., as am'd by L. 1894, ch. 264; L. 1904, ch. 110; L. 1909, ch. 28.

Thus am'd by L. 1910, ch. 296.

Prior to the enactment of the Consolidated Laws of 1909, section 2413 of the Code (now Gen. Corp. Law, § 62, *supra*) provided that notice should be published in the State paper, but this provision has been omitted in the enactment of the foregoing section because the State paper was abolished by the Executive Law, § 74 (now 83), added by L. 1893, ch. 248.

§ 63. Order authorizing change. If the court to which the petition is presented is satisfied thereby, or by the affidavit and certificate presented therewith, that the petition is true, and that there is no reasonable objection to the change of name proposed and that the petition has been duly authorized and that notice of the presentation of the petition, if required by law, has been made, the court shall make an order authorizing the petitioner to assume the name proposed on a day specified therein, not less than thirty days after the entry of the order. The order shall be directed to be entered and the papers

on which it was granted to be filed within ten days thereafter in the office of the clerk of the county in which its certificate of incorporation, if any, shall be filed, or if there be none filed, in which its principal office shall be located, or if it has no business office in the county in which its principal property is situated, or in which its operations are or theretofore have been principally conducted, or in the office of the clerk of the county in which the special term granting the order is held; and that a certified copy of such order shall, within ten days after the entry thereof, be filed in the office of the secretary of state; and also, if it be a banking corporation, in the office of the superintendent of banks, or if it be an insurance corporation, in the office of the superintendent of insurance, or if it be a railroad corporation, in the offices of the public service commissions. Such order shall also direct the publication, within ten days after the entry thereof of a copy thereof, in a designated newspaper, in the county in which the order is directed to be entered, once in each week for four successive weeks. The court may dispense with the publication of a copy of such order and require notice to be given to such persons and in such manner as it thinks proper if the petition be made by a domestic corporation organized under or subject to the religious or membership corporations law.

Formerly § 2414, Code Civ. Pro., as am'd by L. 1895, ch. 946.
Thus am'd by L. 1910, ch. 296.

§ 64. When change to take effect. If the order shall be fully complied with, and within forty days after the making of the order, an affidavit of the publication thereof shall be filed and recorded in the office in which the order is entered, and in each office in which certified copies thereof are required to be filed, if any, the petitioner shall, on and after the day specified for that

purpose in the order, be known by the name which is thereby authorized to be assumed, and by no other name. No proceedings had prior to April fourth, eighteen hundred and ninety-four, under sections two thousand four hundred and fourteen and two thousand four hundred and fifteen of the code of civil procedure for the change of the name of a corporation, shall be invalid by reason of the non-filing of an affidavit of the publication of the order changing such name within twenty days from the date thereof.

Formerly § 2415, Code Civ. Pro., as am'd by L. 1894, ch. 264.

§ 65. Substitution of new name in pending action or proceeding. An action or special proceeding, civil or criminal, commenced by or against a corporation whose name is so changed shall not abate, nor shall any relief, recovery or other proceeding therein be prevented, impeded or impaired in consequence of such change of name. The plaintiff in the action or the party instituting the special proceeding, or the people, as the case requires, may at any time, obtain an order amending any of the papers or proceedings therein, by the substitution of the new name, without costs and without prejudice to the action or proceeding.

Formerly § 2416, Code Civ. Pro.

ARTICLE 4

* Sale of Corporate Real Property

Section 70. Application of this article.

71. Petition.

72. Hearing on application.

73. Order to sell, mortgage or lease.

74. Insolvent corporation.

75. Service of notices.

76. Practice in cases not herein provided for.

§ 70. Application of this article. Whenever any corporation is required by law to make application to the court for leave to mortgage, lease or sell its real estate, the proceeding therefor shall be had pursuant to the provisions of this article.

Formerly part of § 3390, Code Civ. Pro. The other part of former § 3390 is now in Joint-Stock Association Law, § 8.

The above indicates the scope of Article 4 of the General Corporation Law. The six other sections are omitted from this book. Their publication herein could serve no good purpose. No part of said article pertains to stock corporations. Its provisions are applicable only to non-stock corporations. There is no provision in the statutes of the State of New York requiring a stock corporation to apply to the court for leave to mortgage, lease or sell its real estate.

ARTICLE 5

Judicial Supervision of Corporation and of the Officers and Members Thereof

Section 90. Action against officers of corporation for misconduct.

91. Who may bring such an action.

92. Visitatorial power over corporation not affected by this article.

§ 90. Action against officers of corporation for misconduct. An action may be maintained against one or more trustees, directors, managers, or other officers of a corporation, to procure a judgment for the following purposes, or so much thereof as the case requires:

1. Compelling the defendants to account for their official conduct, including any neglect of or failure to perform their duties, in the management and disposition of the funds and property, committed to their charge.

2. Compelling them to pay to the corporation, which they represent, or to its creditors, any money, and the value of any property, which they have acquired to themselves, or transferred to others, or lost, or wasted, by or through any neglect of or failure to perform or by other + violation of their duties.

3. Suspending a defendant from exercising his office, where it appears that he has abused his trust.

4. Removing a defendant from his office, upon proof or conviction of misconduct, and directing a new election to be held by the body or board duly authorized to hold the same, in order to supply the vacancy created by the removal; or, where there is no such body or board, or where all the members thereof are removed, directing the removal to be reported to the governor, who may, with the advice and consent of the senate, fill the vacancies.

5. Setting aside an alienation of property, made by one or more trustees, directors, managers or other officers of a corporation, contrary to a provision of law, or for a purpose foreign to the lawful business and objects of the corporation, where the alienee knew the purpose of the alienation.

6. Restraining and preventing such an alienation, where it is threatened, or where there is good reason to apprehend that it will be made.

7. The court must, upon the application of either party, make an order directing the trial by a jury of the issue of neglect or failure of defendants to perform their duties; and for that purpose the questions to be tried must be prepared and settled as prescribed in section nine hundred and seventy of the code of civil procedure.

As to any litigation pending prior to September one, nineteen hundred and seven, the provisions of this section as they existed prior to that date shall apply.

Formerly Code Civ. Pro. § 1781. Last paragraph was L. 1907, ch. 157, § 2.

Under the provisions of this article an action may be brought by the Attorney-General in the name of the people, without a relator, against a domestic business corporation and its directors to remove the latter from their position, for misconduct, and to compel them to account for and pay over to the corporation, the value of property belonging to it transferred by them to others in violation of their duty, whenever he deems that the action can be maintained and that

the interests of the public will be promoted thereby. *Peo. v. Ballard*, 134 N. Y. 269.

The term "violation of their duties" in subd. 2 means violation of their duties as officers and an action cannot be brought by creditors of a dissolved insolvent corporation in behalf of themselves and other creditors against a former director and treasurer upon his promise to pay all the debts of the corporation in case he should be allowed to acquire its property at a judicial sale for less than its real value. The plaintiffs, however, are entitled to a judgment in equity that the defendant holds the property thus acquired impressed with a trust for the payment of the just claims against the corporation. *Lilienthal v. Betz*, 185 N. Y. 153.

Subdivision 4 should not be so construed as to prevent the removal of directors for their misconduct as officers, for one who is at the same time a director and an executive officer and is guilty of misconduct in one capacity cannot remain in partial control in the other capacity. The re-election of the defendants after the alleged misconduct does not prevent their removal as their tenure of office must be treated as continuous. *Peo. v. Lyon*, 119 App. Div. 361; *affd.*, 189 N. Y. 544.

Directors who have sold all the property of the corporation without providing for the payment of an outstanding judgment are personally liable to the judgment creditor, although the vendee of the property assumed the debts and although the directors did not know of the existence of the judgment. *Darcy v. Brooklyn & N. Y. Ferry Co.*, 127 App. Div. 167.

Applicable to Foreign Corporations.

A director of a foreign corporation transacting business and having its principal office in this State may maintain an action against individuals who were formerly directors for an accounting and restoration of money belonging to the corporation alleged to have been misappropriated and wasted by them in violation of their duties; the contention, that these provisions apply to domestic corporations only and restrict the maintenance of such an action to directors thereof, is not only unauthorized by the general language of the statute but is contrary to justice and sound policy and would render impossible any other form of redress in cases of this character. *Miller v. Quincy*, 179 N. Y. 295; *Acken v. Coughlin*, 103 App. Div. 1.

§ 91. Who may bring such an action. An action may be brought, as prescribed in the last section, by the attorney-general in behalf of the people of the state, or, except where the action is brought for the purpose specified in subdivision third or fourth of that section, by a creditor of the corporation, or by a trustee, director, manager, or other officer of the corporation, having a general superintendence of its concerns.

Formerly Code Civ. Pro. § 1782.

For actions by receivers against delinquent directors, see Gen. Corp. Law, § 231.

This article it seems was not intended to warrant the Attorney-General in bringing the action if only private interests were involved as is evident from the provisions of Gen. Corp. Law, § 304, which limit his authority to cases where in his opinion public interests require such an action. *Swan v. Mutual Reserve Fund Life Assn.*, 155 N. Y. 9, 19.

A director of a domestic corporation may, where he seeks no receiver, maintain an action to prevent his co-directors from making a threatened unlawful alienation of the corporate property detrimental to it. *Green v. Compton*, 41 Misc. 21.

§ 92. Visitatorial power over corporation not affected by this article. This article does not divest or impair any visitatorial power over a corporation, which is vested by statute in a corporate body, or a public officer.

Formerly Code Civ. Pro. § 1783.

ARTICLE 6

Action for Sequestration, Action for Dissolution and Action to Enforce Individual Liability of Officer and Member of Corporation.

Section 100. Action by judgment creditor for sequestration.

101. Action to dissolve a corporation.

102. Who may bring action to dissolve a corporation.

103. Temporary injunction in action authorized by this article.

104. Temporary receiver.

105. Additional powers and duties of temporary receiver.

106. Permanent receiver.

107. Additional duties and liabilities of permanent receiver.

108. Application for appointment of receiver.

109. Officers and stockholders may be made parties in action brought by creditor.

110. Separate action may be brought against officers and stockholders.

111. Proceedings in such actions.

112. Distribution of property of corporation by judgment in actions under this article.

113. Recovery of stock subscriptions.

114. Liability of directors and stockholders.

115. Effect of this article.

§ 100. Action by judgment creditor for sequestration.

Where final judgment for a sum of money has been rendered against a corporation created by or under the laws of the state, and an execution issued thereupon to the sheriff of the county, where the corporation transacts its general business, or where its principal office is located, has been returned wholly or partly unsatisfied, the judgment creditor may maintain an action to procure a judgment sequestering the property of the corporation, and providing for a distribution thereof, as prescribed in section one hundred and twelve of this chapter.

Formerly Code Civ. Pro. § 1784.

The object of this section is to provide a summary mode of compelling the application of the property of a corporation which has allowed an execution to be returned unsatisfied, to the payment of its debts. *Mann v. Pentz*, 3 N. Y. 415.

The liability of a stockholder upon his unpaid subscription may be enforced in an action brought in pursuance of this section to which the stockholder is made a party defendant. *Beals v. Buffalo Construction Co.*, 49 App. Div. 589.

Foreign Corporations.

The section is not applicable to a foreign corporation. *Dreyfus v. Seale*, 37 App. Div. 351; *Burgoyne v. Eastern & W. Ry. Co.*, 13 N. Y. Supp. 537.

The Supreme Court will not interfere with property of a foreign corporation at the instance of a judgment creditor by the appointment of a permanent receiver in the absence of proof that the corporation has fraudulently disposed of its property in the State, or that the corporation has property within this State to which the receivership might attach, and that equitable intervention was necessary. *Dreyfus v. Seale*, 37 App. Div. 351.

§ 101. Action to dissolve a corporation. In either of the following cases, an action to procure a judgment, dissolving a corporation, created by or under the laws of the state, and forfeiting its corporate rights, privileges and franchises, may be maintained, as prescribed in the next section:

1. Where the corporation has remained insolvent for at least one year.

2. Where it has neglected or refused, for at least one

year, to pay and discharge its notes or other evidences of debt.

3. Where it has suspended its ordinary and lawful business for at least one year.

4. If it has banking powers, or power to make loans on pledges or deposits, or to make insurances, where it becomes insolvent or unable to pay its debts, or has violated any provision of the act, by or under which it was incorporated, or of any other act binding upon it.

Formerly Code Civ. Pro. § 1785.

The court has no general jurisdiction of an action brought for dissolution; its power in that respect is derived solely from the statute and unless the complaint in an action brought to dissolve a corporation shows the jurisdictional facts, the court has no power to act, its decree is void and the corporation still exists. *Osborn v. Montelac Park*, 89 Hun 167, *affd.*, 153 N. Y. 672; *Bliven v. Peru Steel & I. Co.*, 9 Abb. N. C. 205; *Denike v. N. Y. & R. Lime Co.*, 80 N. Y. 599.

The Supreme Court upon proof of the insolvency of a corporation, be it regularly or irregularly organized, has the power to terminate its existence, sell its assets and pay its creditors. *Matter of N. Y. Westchester & Boston Ry. Co.*, 193 N. Y. 72.

Insolvency.

A corporation like an individual is insolvent when it is not able to pay its debts. Insolvency means a general inability to answer in the course of business the liabilities existing and capable of being enforced. *Brouwer v. Harbeck*, 9 N. Y. 589, 594; *Marsh v. Duncel*, 25 Hun 167; *Peo. v. Excelsior Gas L. Co.*, 8 Civ. Pro. 390; *Baker v. Emerson*, 4 App. Div. 348; *Olney v. Baird*, 7 App. Div. 95; *Matter of Lenox Corp.* 57 App. Div. 515; *Horrocks Desk Co. v. Fangel*, 71 App. Div. 313.

The rule of the common law that real estate held by a corporation at the time of its dissolution reverts to the grantor does not prevail in the State of New York. Where lands are conveyed absolutely to a corporation having stockholders, no reversion or possibility of a reverter remains in the grantor. *Heath v. Barmore*, 50 N. Y. 302.

§ 102. Who may bring action to dissolve a corporation. An action specified in the last section, may be maintained by the attorney-general, in the name and in behalf of the people. And whenever a creditor or stockholder of any corporation submits to the attorney-general a written statement of facts, verified by oath, showing grounds for an action under the provisions of

the last section, and the attorney-general omits, for sixty days after this submission, to commence an action specified in the last section, then, and not otherwise, such creditor or stockholder may apply to the proper court for leave to commence such an action, and on obtaining leave may maintain the same accordingly.

Formerly Code Civ. Proc. § 1786.

See Gen. Corp. Law, § 304, post, as to duty of Attorney-General.

§ 103. Temporary injunction in action authorized by this article. In an action, brought as prescribed in this article, the court may, upon proof of the facts authorizing the action to be maintained, grant an injunction order, restraining the corporation, and its trustees, directors, managers and other officers, from collecting or receiving any debt or demand, and from paying out, or in any way transferring or delivering, to any person, any money, property, or effects of the corporation, during the pendency of the action; except by express permission of the court. Where the action is brought to procure the dissolution of the corporation, the injunction may also restrain the corporation, and its trustees, directors, managers and other officers, from exercising any of its corporate rights, privileges, or franchises, during the pendency of the action; except by express permission of the court. The provisions of title second of chapter seventh of the code of civil procedure, relating to the granting, vacating or modifying of an injunction order, apply to an injunction order, granted as prescribed in this section; except that it can be granted only by the court.

Formerly Code Civ. Pro. § 1787.

Notice of an application to modify the injunction must be given to the Attorney-General pursuant to G. C. L., § 312, post. *Dohn v. The Buffalo Am. Co.*, 66 App. Div. 446.

§ 104. Temporary receiver. In such an action, the court may also, at any stage thereof, appoint one or more

receivers of the property of the corporation. A receiver, so appointed, before final judgment is a temporary receiver, until final judgment is entered. A temporary receiver has power to collect and receive the debts, demands, and other property of the corporation; to preserve the property, and the proceeds of the debts and demands collected; to sell or otherwise dispose of the property as directed by the court; to collect, receive and preserve the proceeds thereof; and to maintain any action or special proceeding, for either of those purposes. He must qualify as prescribed by law for the qualification of a permanent receiver. Unless additional powers are specially conferred upon him, as prescribed in the next section, a temporary receiver has only the powers specified in this section, and those which are incidental to the exercise thereof.

Formerly Code Civ. Pro. § 1788, in part. For remainder of section, see this article, § 106.

When Appointed.

A temporary receiver should be appointed only where it is essential to the protection of the plaintiff's rights prior to final judgment. *Kieley v. Barron, etc., Co.*, 87 App. Div. 317; *Weber v. Wallerstein*, 111 App. Div. 700; *Hastings v. Tousey*, 121 App. Div. 815; *Peo. v. Oriental Bank*, 124 App. Div. 741; *Federman v. Standard Churn Mfg. Co.*, 128 App. Div. 493.

§ 105. Additional powers and duties of temporary receiver. A temporary receiver, appointed as prescribed in the last section, is, in all respects, subject to the control of the court. In addition to the powers conferred upon him, by the provisions of the last section, the court may, by the order or interlocutory judgment appointing him, or by an order subsequently made in the action, or by the final judgment, confer upon him the powers and authority, and subject him to the duties and liabilities, of a permanent receiver, or so much thereof as it thinks proper; except that he shall not make any distribution among the creditors or stockholders, before final judg-

ment, unless he is specially directed so to do by the court.

Formerly Code Civ. Pro. § 1789.

§ 106. Permanent receiver. A receiver appointed by or pursuant to a final judgment in the action, or a temporary receiver who is continued by the final judgment, is a permanent receiver, and has all the powers and authority conferred, and is subject to all the duties and liabilities imposed upon a receiver in article eleven of this chapter.

Thus am'd by L. 1909, ch. 240. Formerly Code Civ. Pro. § 1788, in part. Remainder of said section in § 104.

§ 107. Additional duties and liabilities of permanent receiver. A permanent receiver shall keep an account of all moneys received by him, and on the first days of January, April, July and October, in each and every year make and file a written statement, verified by his oath that such statement is correct and true, showing the amount of money received by such receiver, his agents or attorneys, the amount he has a right to retain and the items for which he claims to retain the same, and the distributive share due each person interested therein. He shall pay such distributive share to the person or persons entitled thereto, on demand, at any time after such statement. Such account, statement, and all the books and papers of the corporation in the hands of such receiver, shall at all reasonable times be open for the inspection of all persons having an interest therein. And in case of neglect or refusal to comply with either of the above requirements, or any duty imposed upon him, the supreme court, at either an appellate division or special term, shall, on the application of the party aggrieved, unless such neglect or refusal shall be satisfactorily explained to the court, forthwith remove such receiver, and appoint some suitable person as receiver in

his place. Such removal shall not vitiate or annul any legal proceedings had by such receiver; but such proceedings shall be continued by such successor as if no removal had been made. Such receiver shall also be liable to pay to the party interested, interest at the rate of ten per centum per annum on all moneys due to such party and retained by him more than one day after such demand made as aforesaid.

Formerly R. S., Pt. 3, Ch. 8, Tit. 4, Art. 2, § 42, as amended by L. 1858, ch. 348, § 1.

§ 108. Application for appointment of receiver. Applications made by the attorney-general for the appointment of a receiver of a corporation shall be made in the judicial district in which the action in which the appointment is sought is triable.

Formerly L. 1883, ch. 378, § 1, in part, as amended by L. 1896, ch. 282, § 1.

This section relates exclusively to receivers appointed in proceedings in insolvency and not in foreclosure. *U. S. Trust Co. v. N. Y. W. S., etc., R. R. Co.*, 101 N. Y. 478.

§ 109. Officers and stockholders may be made parties in action brought by creditor. Where the action is brought by a creditor of a corporation, and the stockholders, directors, trustees, or other officers, or any of them, are made liable by law, in any event or contingency, for the payment of his debt, the persons, so made liable, may be made parties defendant, by the original or by a supplemental complaint; and their liability may be declared and enforced by the judgment in the action.

Formerly Code Civ. Pro. § 1790.

§ 110. Separate action may be brought against officers and stockholders. Where the stockholders, directors, trustees, or other officers of a corporation, who are made liable, in any event or contingency, for the payment of a debt, are not made parties defendant, as prescribed in

the last section, the plaintiff in the action may maintain a separate action against them, to procure a judgment, declaring, apportioning and enforcing their liability.

Formerly Code Civ. Pro. § 1791.

§ 111. Proceedings in such actions. In an action brought as prescribed in either of the last two sections, the court must, when it is necessary, cause an account to be taken of the property and of the debts of the corporation, and thereupon the defendant's liability must be apportioned accordingly; but, if it affirmatively appears, that the corporation is insolvent, and has no property to satisfy its creditors, the court may, without taking such an account, ascertain and determine the amount of each defendant's liability, and enforce the same accordingly.

* Formerly Code Civ. Pro. § 1792.

§ 112. Distribution of property of corporation by judgment in actions under this article. A final judgment in an action, brought against a corporation, as prescribed in this article, either separately or in conjunction with its stockholders, directors, trustees, or other officers, must provide for a just and fair distribution of the property of the corporation, and of the proceeds thereof, among its fair and honest creditors, in the order and in the proportions prescribed by law, in case of the voluntary dissolution of a corporation.

Formerly Code Civ. Pro. § 1793.

For distribution in case of voluntary dissolution see Gen. Corp. Law, § 261.

§ 113. Recovery of stock subscriptions. Where the stockholders of the corporation are parties to the action, if the property of the corporation is not sufficient to discharge its debts, the interlocutory or final judgment, as the case requires, must adjudge that each stockholder pay into court the amount due and remaining unpaid,

on the shares of stock held by him, or so much thereof as is necessary to satisfy the debts of the corporation.

Formerly Code Civ. Pro. § 1794.

See Stock Corp. Law, §§ 55, 56, and cases cited thereunder.

The liability of the stockholder need not be enforced under the Stock Corporation Law, but may be enforced in the sequestration action. *Bcals v. Buffalo Cons. Co.*, 49 App. Div. 589.

§ 114. Liability of directors and stockholders. If it appears, that the property of the corporation, and the sums collected or *collectable from the stockholders, upon their stock subscriptions, are or will be insufficient to pay the debts of the corporation, the court must ascertain the several sums, for which the directors, trustees, or other officers, or the stockholders of the corporation, being parties to the action, are liable; and must adjudge that the same be paid into court, to be applied, in such proportions and in such order as justice requires, to the payment of the debts of the corporation.

Formerly Code Civ. Pro. § 1795.

§ 115. Effect of this article. This article does not repeal or affect any special provision of law, prescribing that a particular kind of corporation shall cease to exist, or shall be dissolved, in a case or in a manner, not prescribed in this article; or any special provision of law, prescribing the mode of enforcing the liability of the stockholders of a particular kind of corporation.

Formerly Code Civ. Pro. § 1796.

ARTICLE 7

Action to Annul a Corporation

Section 130. Action by attorney-general to annul corporation when legislature directs.

131. Action by attorney-general to annul corporation by leave of court.

*So in original law.

132. Notice of application for leave to commence action to annul corporation.

133. Jury trial.

134. Injunction and receiver in final judgment.

135. Temporary injunction.

136. Filing and publishing judgment.

§ 130. Action by attorney-general to annul corporation when legislature directs. The attorney-general, whenever he is so directed by the legislature, must bring an action against a corporation created by or under the laws of the state, to procure a judgment, vacating or annulling the act of incorporation, or any act renewing the corporation, or continuing its corporate existence, upon the ground that the act was procured upon a fraudulent suggestion, or the concealment of a material fact, made by or with the knowledge and consent of any of the persons incorporated.

Formerly Code Civ. Pro. § 1797.

§ 131. Action by attorney-general to annul corporation by leave of court. Upon leave being granted, as prescribed in the next section, the attorney-general may bring an action against a corporation created by or under the laws of the state, to procure a judgment, vacating the charter or annulling the existence of the corporation, upon the ground that it has, either

1. Offended against any provision of an act, by or under which it was created, altered or renewed, or an act amending the same, and applicable to the corporation; or,

2. Violated any provision of law, whereby it has forfeited its charter, or become liable to be dissolved, by the abuse of its powers; or,

3. Forfeited its privileges or franchises, by a failure to exercise its powers; or,

4. Done or omitted any act, which amounts to a surrender of its corporate rights, privileges, and franchises; or,

5. Exercised a privilege or franchise, not conferred upon it by law.

Formerly Code Civ. Pro. § 1798.

Scope of Section.

This section contains no rule of liability whatever, but simply points out a mode of procedure to enforce duties or punish misconduct elsewhere and otherwise settled and determined and enumerates the classes of cases in which if liability does exist the Attorney-General may move, having first obtained the assent of the court. *Peo. v. Atlantic Ave. R. R. Co.*, 125 N. Y. 513.

It appears to be settled that the State as prosecutor must show on the part of the corporation accused, some sin against the law of its being which has produced or tends to produce injury to the public. *Peo. v. North River S. R. Co.*, 121 N. Y. 582.

A corporation cannot cease to exist of its own volition. It may become dormant but in the absence of some express statutory provision its life continues until its charter period has expired or the court has decreed a dissolution. *Geneva Mineral Spring Co. v. Coursey*, 45 App. Div. 268; *Peo. v. Manhattan Co.*, 9 Wend. 351; *Towar v. Hale*, 46 Barb. 361.

The mere omission to exercise certain powers given is not such an abuse of the corporation's powers or privileges as to work a forfeiture. *Attorney-General v. Bank of Niagara, Hopkins* Ch. 354.

§ 132. Notice of application for leave to commence action to annul corporation. Before granting leave, the court may, in its discretion, require such previous notice of the application as it thinks proper, to be given to the corporation, or any officer thereof, and may hear the corporation in opposition thereto.

Formerly Code Civ. Pro. § 1799.

As to when the Attorney-General must apply for leave see Gen. Corp. Law, § 304, post.

§ 133. Jury trial. An action, brought as prescribed in this article, is triable, of course and of right, by a jury, as if it was an action specified in section nine hundred and sixty-eight of the code of civil procedure and without procuring an order, as prescribed in section nine hundred and seventy of the code of civil procedure.

Formerly Code Civ. Pro. § 1800.

§ 134. Injunction and receiver in final judgment. Where any of the matters, specified in section one hundred and thirty or section one hundred and thirty-one of this article, are established in an action, brought as prescribed in either of those sections, the court may render final judgment that the corporation, and each officer thereof, be perpetually enjoined from exercising any of its corporate rights, privileges, and franchises; and that it be dissolved. The judgment must also provide for the appointment of a receiver, the taking of an account, and the distribution of the property of the corporation, among its creditors and stockholders, as where a corporation is dissolved upon its voluntary application, as prescribed in article nine of this chapter.

Formerly Code Civ. Pro. § 1801.

See Gen. Corp. Law, §§ 191 and 230 as to permanent receivers.

§ 135. Temporary injunction. In an action, brought as prescribed in this article, an injunction order may be granted, at any stage of the action, restraining the corporation, and any or all of its directors, trustees and other officers, from exercising any of its corporate rights, privileges, or franchises; or from exercising certain of its corporate rights, privileges, or franchises, specified in the injunction order; or from exercising any franchise, liberty, or privilege, or transacting any business, not allowed by law. Such an injunction is deemed one of those specified in section six hundred and three of the code of civil procedure, and all the provisions of title second of chapter seventh of the code of civil procedure applicable to an injunction specified in that section, apply to an injunction granted as prescribed in this section, except that it can be granted only by the court.

Formerly Code Civ. Pro. § 1802.

See Gen. Corp. Law § 305, as to notice to corporation.

See Gen. Corp. Law, § 302, respecting injunctions restraining creditors.

§ 136. Filing and publishing judgment. Where final judgment is rendered against a corporation, in an action, brought as prescribed in this article, the attorney-general must cause a copy of the judgment-roll to be forthwith filed in the office of the secretary of state; who must cause a notice of the substance and effect of the judgment, to be published, for four weeks, in a newspaper printed in the county, wherein the principal place of business of the corporation was located.

Formerly Code Civ. Pro. § 1803.

Prior to the enactment of the Consolidated Laws of 1909, section 1803 of the Code (now Gen. Corp. Law, § 136, *supra*) provided that the notice should be published "in the newspaper printed at Albany in which legal notices are required to be published" but the quoted words were omitted in the enactment of § 136, *supra*, by L. 1909, ch. 28.

ARTICLE 8

Action to Dissolve Moneyed Corporation

Article 8 of the General Corporation Law, which embodies sections 150 to 161, both inclusive, applies exclusively to actions for the appointment of receivers of moneyed corporations, to-wit: Insurance and banking corporations. As this book does not relate to that class of corporations, said article, in its entirety, is omitted herefrom.

ARTICLE 9

Proceedings for Voluntary Dissolution of Corporation

- Section 170. Petition for voluntary dissolution of corporation.
171. Directors or trustees may be required to petition.
172. Petition when directors or trustees do not agree.
173. Corporations excepted from two preceding sections.
174. Contents of petition.
175. Affidavit to be annexed to petition.
176. Presentation of petition.
177. Corporations without stockholders.
178. Action by court upon petition for dissolution.
179. Publication of order to show cause why corporation should not be dissolved.

180. Service of order to show cause.
181. Entering and filing order and papers.
182. Temporary receiver.
183. Application for appointment of receiver.
184. Injunction.
185. Referee.
186. Hearing.
187. Decision.
188. Use of original papers on hearing.
189. Amending papers.
190. Final order.
191. Permanent receiver.
192. Appointment of director, trustee or other officer or stockholder as receiver.
193. Certain sales, transfers and judgments void.
194. Omission, defect or default of receiver.
195. Exception of certain corporations.

§ 170. Petition for voluntary dissolution of corporation. If a majority of the directors, trustees, or other officers, having the management of the concerns of a corporation created by or under the laws of the state, discover that the stock, effects, and other property thereof are not sufficient to pay all just demands, for which it is liable, or to afford a reasonable security to those who may deal with it; or if, for any reason, they deem it beneficial to the interests of the stockholders that the corporation should be dissolved, they may present a petition to the supreme court praying for a final order dissolving the corporation, as prescribed in this article.

Formerly Code Civ. Pro. § 2419.

Where all the officers and directors of the corporation except the secretary resign with the express purpose of instituting an action to procure the appointment of a receiver on the ground that there is no officer empowered to hold the assets of the company, such resignations are not legal nor effective, for the officers of the corporation may ask for its dissolution and the appointment of a receiver under this article, in which case the officers are not required to resign, but the action is instituted in their official capacity. *Zeltner v. Zeltner Brewing Co.*, 174 N. Y. 247.

Although the proceedings to dissolve the corporation may be void because of the failure to give the notice of the application for the order to show cause to the Attorney-General pursuant to G. C. L. § 312, nevertheless the proceeding is commenced by the filing of the petition and after such filing the court acquires jurisdiction to forthwith appoint a temporary receiver

provided the petition contains some evidence of insolvency. *Knickerbocker T. Co. v. Tarrytown, etc., Ry. Co.*, 117 N. Y. Supp. 871.

§ 171. Directors or trustees may be required to petition. It shall be the duty of a majority of the directors or trustees of every corporation created by or under the laws of this state to present a petition as prescribed in the last section whenever directed so to do by a majority in interest of its stockholders.

Formerly Code Civ. Pro. § 2420, in part. For remainder of section see §§ 172 and 173 of this article.

§ 172. Petition when directors or trustees do not agree. If a corporation, created under a general statute of the state for the formation of corporations or under any special act or charter has an even number of trustees or directors who are equally divided respecting the management of its affairs, or if the stock of such corporation is equally divided into not more than two independent ownerships or interests, or if the entire stock of the corporation is, at that time, owned by the trustees or directors who are even in number or equally divided representing the management of its affairs, or if the stock is so divided, that one-half thereof is owned or controlled by persons favoring the course of part of the trustees or directors and one-half thereof is owned by persons favoring the course of the other trustees or directors, the trustees or directors or the stockholders or one or more of them may present a petition as prescribed in section one hundred and seventy of this chapter.

Formerly Code Civ. Pro., § 2420, in part. For remainder of section see §§ 171 and 173 of this article.

If the petitioner in a proceeding under this section having an even number of trustees equally divided respecting its management, neglect or refuse after a referee has been appointed, to apply for a final order as contemplated by section 190 of this article, it is competent for the court on such appeal of any person interested to direct the petitioner to move so that the interests of all may be protected. *Matter of Peekamose Fishing Club*, 151 N. Y. 511.

§ 173. Corporations excepted from two preceding sections. Sections one hundred and seventy-one and one hundred and seventy-two of this chapter do not apply to a savings bank, a trust company, a safe deposit company, or a corporation formed to rent safes in burglar and fire-proof vaults, or for the construction or operation of a railroad, or for aiding in the construction thereof, or for carrying on the business of banking or insurance, or intended to derive a profit from the loan or use of money.

Formerly Code Civ. Pro. § 2420, in part. For remainder of section see §§ 171 and 172 of this article.

§ 174. Contents of petition. The petition must show that the case is one of those specified in sections one hundred and seventy and one hundred and seventy-two of this chapter, and must state the reasons, which induce the petitioner or petitioners to desire the dissolution of the corporation. A schedule must be annexed to the petition, containing the following matters, as far as the petitioner or petitioners know, or have the means of knowing the same:

1. A full and true account of all the creditors of the corporation, and of all unsatisfied engagements, entered into by, and subsisting against, the corporation.

2. A statement of the name and place of residence of each creditor, and of each person with whom such an engagement was made, and to whom it is to be performed, if known; or, if either is not known, a statement of that fact.

3. A statement of the sum owing to each creditor, or other person specified in the last subdivision, and the nature of each debt, demand, or other engagement.

4. A statement of the true cause and consideration of the indebtedness to each creditor.

5. A full, just, and true inventory of all the property of the corporation, and of all the books, vouchers, and securities, relating thereto.

6. A statement of each incumbrance upon the property of the corporation, by judgment, mortgage, pledge, or otherwise.

7. A full, just, and true account of the capital stock of the corporation, specifying the name of each stockholder; his residence, if it is known, or if it is not known, stating that fact; the number of shares belonging to him; the amount paid in upon his shares; and the amount still due thereupon.

Formerly Code Civ. Pro. § 2421, as am'd by L. 1909, ch. 240.

§ 175. Affidavit to be annexed to petition. An affidavit, made by each of the petitioners, to the effect that the matters of fact, stated in the petition and the schedule, are just and true, so far as the affiant knows or has the means of knowing the same, must be annexed to the petition and schedule.

Formerly Code Civ. Pro. § 2422.

§ 176. Presentation of petition. The papers must be presented at a special term of the supreme court, held within the judicial district, embracing the county wherein the principal office of the corporation is located.

Formerly Code Civ. Pro. § 2423, in part. For remainder of section see §§ 178, 181, 182, 184 of this article.

§ 177. Corporations without stockholders. In the case of corporations affected by the provisions of this article and not having stockholders, it shall be sufficient for the purposes of this article to notify, name and refer to the "members" of such corporations, instead of "stockholders," as herein provided.

Formerly Code Civ. Pro. § 2431, in part. For remainder of section see § 195 of this article.

§ 178. Action by court upon petition for dissolution.

In a case specified in sections one hundred and seventy-one and one hundred and seventy-two of this chapter the court may, in its discretion, entertain or dismiss the application. Where it entertains the application, or where the cause is one of those specified in section one hundred and seventy of this chapter, the court must make an order, requiring all persons interested in the corporation to show cause before it, or before a referee designated in the order, at a time and place therein specified, not less than six weeks after the granting of the order, why the corporation should not be dissolved.

Formerly Code Civ. Pro. § 2423, in part, as am'd by L. 1909, ch. 240. For remainder of section see §§ 176, 181, 182, 184 of this article.

§ 179. Publication of order to show cause why corporation should not be dissolved. A copy of the order must be published, as prescribed therein, at least once in each of the three weeks immediately preceding the time fixed therein for showing cause, in one or more newspapers, specified in the order, published in the city or county wherein the order is entered.

Thus am'd by L. 1909, ch. 28. Formerly Code Civ. Pro. § 2424. The note under § 136, *supra*, also applies to this section.

§ 180. Service of order to show cause. A copy of the order must also be served upon each of the persons, specified in the schedule as a creditor or stockholder of the corporation, or as a person to whom an engagement of the corporation is to be performed, other than a person whose residence is stated to be unknown, or to be without the United States. The service must be made either personally, at least ten days before the time appointed for the hearing; or by depositing a copy of the order, at least twenty days before the time so appointed, in the post-office, inclosed in a postpaid wrapper, ad-

addressed to the person to be served, at his residence, as stated in the schedule.

Formerly Code Civ. Pro. § 2425.

§ 181. Entering and filing order and papers. The order must be entered, and the papers must be filed, within ten days after the order is made, with the clerk of the county where the principal office of the corporation is located.

Formerly Code Civ. Pro. § 2423. For remainder of section see §§ 176, 178, 182, 184 of this article.

§ 182. Temporary receiver. If it shall be made to appear to the satisfaction of the court that the corporation is insolvent, the court may at any stage of the proceedings before the final order, on motion of the petitioners on notice to the attorney-general, or on motion of the attorney-general on notice to the corporation, appoint a temporary receiver of the property of the corporation, which receiver shall have all the powers and be subject to all the duties that are defined as belonging to temporary receivers appointed in an action, in section one hundred and four of this chapter. The court may also, in its discretion, at any stage in the proceeding after the appointment of a temporary receiver, upon like motion and notice, confer upon such temporary receiver the powers and authority, and subject him to the duties and liabilities of a permanent receiver, or as much thereof as it thinks proper, except that he shall not make any final distribution among the creditors and stockholders, before final order in the proceedings, unless he is specially directed so to do by the court.

Formerly Code Civ. Pro. § 2423. For remainder of section see §§ 176, 178, 181, 184 of this article.

§ 183. Application for appointment of receiver. Every application made for the appointment of a receiver of a corporation other than applications made by the

attorney-general on behalf of the people of the state, shall be made at a special term of the supreme court held in and for the judicial district in which the principal business office of the corporation is located.

Formerly L. 1883, ch. 378, § 1, in part, as am'd by L. 1896, ch. 282, § 1.

§ 184. Injunction. If a temporary receiver be appointed, the court may, in its discretion, on like motion and notice, with or without security, at any stage of the proceeding before the final order, grant an injunction, restraining the creditors of the corporation, from beginning any action against the said corporation for the recovery of a sum of money, or from taking any further proceedings in such an action theretofore commenced. Such injunction shall have the same effect and be subject to the same provisions of law as if each creditor upon whom it is served was named therein.

Formerly Code Civ. Pro. § 2423, in part. For remainder of section see §§ 176, 178, 181, 182 of this article.

§ 185. Referee. If a referee was not designated in the order to show cause, the court may, in its discretion, appoint a referee when or after the order is returnable.

Formerly Code Civ. Pro. § 2426, in part. For remainder of section see §§ 186, 187 of this article.

§ 186. Hearing. At the time and place specified in the order, or at the time and place to which the hearing is adjourned, the court, or the referee, must hear the allegations and proofs of the parties, and determine the facts.

Formerly Code Civ. Pro. § 2426, in part. For remainder of section see §§ 185, 187 of this article.

§ 187. Decision. The decision of the court, or the report of the referee, must be in writing, and must be made and filed with all convenient speed. It must contain a statement of the effects, credits, and other property, and of the debts and other engagements, of the

corporation, and of all other matters, pertaining to its affairs.

Formerly Code Civ. Pro. § 2426, in part. For remainder of section see §§ 185, 186 of this article.

§ 188. Use of original papers on hearing. The court or the referee is entitled to use, upon the hearing, the original petition, and the schedules annexed thereto; and the clerk must transmit them accordingly, upon the written order of the judge, or of the referee. In that case, they must be returned with the decision or report.

Formerly Code Civ. Pro. § 2427, in part. For remainder of section see § 189 of this article.

§ 189. Amending papers. The court may, at any stage of the proceedings before final order, on the application of the petitioners, or a majority of them, or on the application of the temporary receiver, grant an order amending the schedules annexed to the original petition, by the insertion of additional items, or by making the statements or inventory fuller and in greater detail than as originally filed, with the like effect as though said petition and schedules had been originally presented and filed as amended.

Formerly Code Civ. Pro. § 2427, in part. For remainder of section see § 188 of this article.

§ 190. Final order. Where the hearing is before a referee, a motion for a final order must be made to the court, upon notice to each person who has made himself a party to the proceedings, by filing with the clerk, before the close of the hearing, a notice of his appearance, in person or by attorney, specifying a post-office within the state, where such a notice may be served. The notice may be served as prescribed in the code of civil procedure for the service of a paper upon an attorney in an action. Where the hearing was before the court, a motion for a final order may be made immediately, or at such a time and upon such a notice, as the court prescribes.

Formerly Code Civ. Pro. § 2428.

After filing notice of appearance, interested parties are entitled to notice of all applications made to the court. In re Wendler Machine Co., 2 App. Div. 16.

§ 191. Permanent receiver. Upon an application for a final order, if it appear to the court in a case specified in section one hundred and seventy of this chapter that the corporation is insolvent, or, in a case specified either in that section, or in section* one hundred and seventy-one and one hundred and seventy-two of this chapter, that for any reason a dissolution of the corporation will be beneficial to the interests of the stockholders and not injurious to the public interests, the court must make a final order dissolving the corporation, and appointing one or more receivers of its property. But in the case of a solvent corporation, the court may, if there is no objection by creditors, dispense with a receiver and provide in the final order for the distribution of the assets. Upon the entry of the order the corporation is dissolved. A receiver appointed under this section shall have all the powers, duties and liabilities of receivers under article eleven of this chapter.

Formerly Code Civ. Pro. § 2429, in part, as am'd by L. 1909, ch. 240. For remainder of section see §§ 192, 194 of this article.

As to survival of causes of action against trustees, see Gen. Corp Law, § 35.

When the interests of stockholders are so discordant as to prevent efficient management and a large majority of both directors and members wish to wind up its affairs a dissolution thereof will be beneficial to the interests of the stockholders because the object of its corporate existence cannot be attained. *Hitch v. Hawley*, 132 N. Y. 212.

§ 192. Appointment of director, trustee or other officer or stockholder as receiver. The court may, in its discretion, appoint a director, trustee, or other officer, or a stockholder of the corporation, a receiver of its property.

Formerly Code Civ. Pro. § 2429, in part. For remainder of said section see §§ 191, 194 of this article.

* So in the original.

§ 193. Certain sales, transfers and judgments void. A sale, assignment, mortgage, conveyance, or other transfer, of any property of a corporation, made after the filing of a petition as prescribed in this article, in payment of, or as security for, an existing or prior debt, or for any other consideration; or a judgment thereafter rendered against the corporation by confession, or upon the acceptance of an offer, is absolutely void, as against the receiver appointed in the special proceeding, and as against the creditors of the corporation.

Formerly Code Civ. Pro. § 2430.

§ 194. Omission, defect or default of receiver. In a proceeding for the voluntary dissolution of a corporation, the court may, in the furtherance of justice, upon notice to the attorney-general, and the attorney-general not objecting, and upon such further notice to creditors or others interested as the court shall direct, which notice may be made by mail upon all persons and corporations not residing or existing within the state, relieve a receiver from any omission, defect or default, in any proceeding or act required by law to be taken or done, or in the giving of any notice required by law to be given, and the court may upon like notice, confirm any act of a receiver, and any decision, report, order or judgment made in such proceeding.

Formerly Code Civ. Pro. § 2429, in part. For remainder of section see §§ 191, 192 of this article.

§ 195. Exception of certain corporations. This article does not apply to an incorporated library society, to a religious corporation, or to a select school or academy, incorporated by the regents of the university or by the legislature, or to a municipal or other political corporation.

Formerly Code Civ. Pro. § 2431, in part. For remainder of section see § 177 of this article.

ARTICLE 10

Dissolution of Stock Corporation without Judicial Proceedings

Section 220. Dissolution of stock corporation before beginning business.

221. Dissolution of stock corporation before expiration of time limit.

§ 220. Dissolution of stock corporation before beginning business. The incorporators named in any certificate of incorporation filed for the purpose of creating a domestic stock corporation, other than a moneyed or transportation corporation, may, before the payment of any part of the capital, and before beginning business, surrender all corporate rights and franchises, by signing, verifying and filing in the office of the secretary of state and the clerk of the county where the certificate of incorporation is filed, a certificate setting forth the names of the incorporators, that no part of the capital has been paid, that there are no liabilities, that such business has not been begun, and surrendering all rights and franchises; and proof of the facts set forth in such certificate to the satisfaction of the secretary of state; and thereupon the said corporation shall be dissolved, and its corporate existence and power shall cease. In case any incorporator of such a corporation shall be deceased, then the aforesaid certificate may be made by the surviving incorporators providing two years shall have elapsed since the date of its incorporation, but in such case the certificate shall set forth the fact that one or more of said incorporators is deceased.

Formerly Stock Corp. Law, § 61, as added by L. 1904, ch. 296, § 1.

For form of certificate, see post, Form No. 49.

§ 221. **Dissolution of stock corporation before expiration of time limit.** Any stock corporation, except a moneyed or a railroad corporation, may be dissolved before the expiration of the time limited in its certificate of incorporation or in its charter as follows:

1. The board of directors of any such corporation may at a meeting called for that purpose, upon at least three days' notice to each director, by a vote of a majority of the whole board, adopt a resolution that it is in their opinion advisable to dissolve such corporation forthwith, and thereupon shall call a meeting of the stockholders for the purpose of voting upon a proposition that such corporation be forthwith dissolved. Such meeting of the stockholders shall be held not less than thirty nor more than sixty days after the adoption of such resolution, and the notice of the time and place of such meeting so called by the directors shall be published in one or more newspapers published and circulating in the county wherein such corporation has its principal office, at least once a week for three weeks successively next preceding the time appointed for holding such meeting, and on or before the day of the first publication of such notice, a copy thereof shall be served personally on each stockholder, or mailed to him at his last known post-office address. Such meeting shall be held in the city, town or village in which the last preceding annual meeting of the corporation was held, and said meeting may, on the day so appointed, by the consent of a majority in interest of the stockholders present, be adjourned from time to time, and notice of such adjournment shall be published in the newspapers in which the notice of the meeting is published. If at any such meeting the holders of two-thirds in amount of the stock of the corporation, then outstanding, shall, in person or by attorney, consent that such dissolution shall take place and signify such con-

sent, in writing, then such corporation shall file such consent, attested by its secretary or treasurer, and its president or vice-president, together with the powers of attorney signed by such stockholders executing such consent by attorney, with a statement of the names and residences of the then existing board of directors of said corporation, and the names and residences of its officers duly verified by the secretary or treasurer or president of said corporation, in the office of the secretary of state.

2. The secretary of state shall thereupon issue to such corporation, in duplicate, a certificate of the filing of such papers and that it appears therefrom that such corporation has complied with this section in order to be dissolved, and one of such duplicate certificates shall be filed by such corporation in the office of the clerk of the county in which such corporation has its principal office; and thereupon such corporation shall be dissolved and shall cease to carry on business, except for the purpose of adjusting and winding up its business. The board of directors shall cause a copy of such certificate to be published at least once a week for two weeks in one or more newspapers published and circulating in the county in which the principal office of such corporation is located, and at the expiration of such publication, the said corporation by its board of directors shall proceed to adjust and wind up its business and affairs with power to carry out its contracts and to sell its assets at public or private sale, and to apply the same in discharge of debts and obligations of such corporation, and, after paying and adequately providing for the payment of such debts and obligations, to distribute the balance of assets among the stockholders of said corporation, according to their respective rights and interests.

3. Said corporation shall nevertheless continue in existence for the purpose of paying, satisfying and dis-

charging any existing debts or obligations, collecting and distributing its assets and doing all other acts required in order to adjust and wind up its business and affairs, and may sue and be sued for the purpose of enforcing such debts or obligations, until its business and affairs are fully adjusted and wound up.

4. After paying or adequately providing for the debts and obligations of the corporation the directors may, with the written consent of the holders of two-thirds in amount of the capital stock, sell the remaining assets or any part thereof to a corporation organized under the laws of this or any other state, and engaged in a business of the same general character, and take in payment therefor the stock or bonds or both of such corporation and distribute them among the stockholders, in lieu of money, in proportion to their interest therein, but no such sale shall be valid as against any stockholder, who, within sixty days after the mailing of notice to him of such sale, shall apply to the supreme court in the manner provided by section seventeen of the stock corporation law, for an appraisal of the value of his interest in the assets so sold; unless within thirty days after such appraisal the stockholders consenting to such sale, or some of them, shall pay to such objecting stockholder or deposit for his account, in the manner directed by the court, the amount of such appraisal and upon such payment or deposit the interest of such objecting stockholder shall vest in the person or persons making such payment or deposit.

Formerly Stock Corp. Law, § 57, as added by L. 1896, ch. 932, § 1, and am'd by L. 1900, ch. 760, § 1.

Although Gen. Corp. Law, § 35, makes the directors trustees in case of dissolution, nevertheless an action for a tort committed by a corporation or its servants during its lifetime should be brought against the corporation after its dissolution because of subdivision 3 of this section. It may be that the trustees are proper parties, but it is clear that the action will not lie against them alone. *Cunningham v. Glauber*, 133 App. Div. 10, affg. 61 Misc. 443. See, also, § 35 of this law.

ARTICLE 10-a*Provisions Applicable to Temporary and Permanent
Receivers of Corporations**

Section 225. Security.

226. Removal or new bond.

227. Notice to sureties upon accounting.

§ 225. Security. A receiver, appointed in an action or special proceeding, must, before entering upon his duties, execute and file with the proper clerk, a bond to the people, with at least two sufficient sureties, in a penalty fixed by the court, judge, or referee, making the appointment, conditioned for the faithful discharge of his duties as receiver; and the execution of any such bond by any fidelity or surety company authorized by the laws of this state to transact business, shall be equivalent to the execution of said bond by two sureties. But this section does not apply to a case where special provision is made by law for the security to be given by a receiver or for increasing the same.

The same provision is found in Code, § 715.

See also Code, §§ 729 and 730, as to sufficiency of bond and amending defects.

§ 226. Removal or new bond. The court, or, where the order was made out of court, the judge making the order, by or pursuant to which the receiver was appointed, or his successor in office, may, at any time, remove the receiver, or direct him to give a new bond, with new sureties, with the like condition specified in the last section. But this section does not apply to a case where special provision is made by law for the security to be given by a receiver, or for increasing the same, or for removing a receiver.

*This article, consisting of §§ 225, 226, and 227, is new, added by L. 1909, ch. 240.

§ 227. **Notice to sureties upon accounting.** A receiver who, having executed and filed a bond as provided for in section two hundred and twenty-five or section two hundred and twenty-six of this chapter, before presenting his accounts as receiver, must give notice to the surety or sureties on his official bond, of his intention to present his accounts, not less than eight days before the day set for the hearing on said accounting. The same notice must be given to such surety or sureties where the accounting is ordered on the petition of a person or persons other than the receiver, and in no case shall the receiver's accounts be passed, settled or allowed, unless the said notice provided for in this section shall have first been given to the surety or sureties on the official bond of such receiver.

ARTICLE 11

Powers, Duties and Liabilities of Receivers of Corporation

- Section 230. Application of this article.
- 231. Receiver trustee of property.
 - 232. Receiver's title to property.
 - 233. Transfer of assets of corporation to receiver.
 - 234. Security of receiver.
 - 235. Authority of single receiver.
 - 236. Authority where there is more than one receiver.
 - 237. Surviving receivers.
 - 238. Oath of receiver.
 - 239. General powers of receivers.
 - 240. Power of receiver to institute proceedings to recover assets.
 - 241. Power of receiver in the settlement of controversies.
 - 242. Power of receiver to employ counsel.
 - 243. Power of receiver to hold real property.
 - 244. Power of receiver to recover stock subscriptions.
 - 245. Duty of receiver to convert assets into money.
 - 246. Duty of receiver as to private sales.
 - 247. Duty of receiver to keep accounts.
 - 248. Duty of receiver to serve copy of report upon attorney-general and superintendent of banks.

- 249. Duty of certain receivers to make reports.
- 250. Duty of receivers to give notice to creditors.
- 251. Delivery of property and payment of debts to receiver after notice.
- 252. Penalty for concealing property from receiver.
- 253. Duty of receiver to call creditors' meeting.
- 254. Proceedings at creditors' meeting.
- 255. Deduction of disbursements and commissions by receiver.
- 256. Refunding consideration of subsisting contracts.
- 257. Retention of funds for subsisting contracts and pending suits.
- 258. Payment of debts not due.
- 259. Allowance of set-offs.
- 260. Penalties recovered by receiver.
- 261. Order of payment by receiver.
- 262. Failure to file claim before first dividend.
- 263. Second dividend by receiver.
- 264. Surplus to stockholders.
- 265. Disposition of moneys retained by receiver for suits.
- 266. Duty of receiver as to unclaimed dividend.
- 267. Effect of failure to file claim before second dividend.
- 268. Final accounting by receiver.
- 269. Notice of final accounting.
- 270. Hearing on final accounting.
- 271. Reference of final account.
- 272. Further accounting.
- 273. Removal of receiver.
- 274. Vacancy.
- 275. Renunciation by receiver.
- 276. Control of receiver by court.
- 277. Commissions and expenses of receiver in voluntary dissolution.
- 278. Commissions and expenses of receiver except in voluntary dissolution.

§ 230. **Application of this article.** Unless otherwise provided the provisions of this article shall apply only to permanent receivers appointed pursuant to section one hundred and six or section one hundred and ninety-one of this chapter.

New; added by L. 1909, ch. 28.

Section 106 provides for a permanent receiver in actions by judgment creditors for sequestration and also actions to dissolve a corporation.

Section 191 provides for receivers in actions for voluntary dissolution.

Section 134 provides for the appointment of a permanent receiver in an action to annul a corporation, as where a corporation is dissolved upon its voluntary application, see section 191.

This article, therefore, applies to permanent receivers in actions brought under articles 6, 7, and 9, *supra*.

§ 231. Receiver trustee of property. Permanent receivers shall be trustees of the property for the benefit of the creditors of the corporation and of its stockholders.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 67, in part.

As to when directors are trustees in case of dissolution see Gen. Corp. Law, § 35.

§ 232. Receiver's title to property. Such receivers shall be vested with all the property, real and personal, of the corporation, from the time of their having filed the security required by law.

Thus am'd by L. 1909, ch. 240. Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 67, in part.

§ 233. Transfer of assets of corporation to receiver. In all cases where receivers have been or shall be appointed for any corporation of this state other than an insurance company on application by the attorney-general, all property, real and personal, and all securities of every kind and nature belonging to such corporation, no matter where located or by whom held, shall be transferred to, vested in and held by such receiver; provided, however, that such transfer shall only be made when directed by an order of the supreme court, due notice of the application for such order having been made on the attorney-general and the custodian of the funds, securities or property.

Formerly L. 1884, ch. 285, § 1.

The receiver takes title by virtue of the statute and no formal conveyance is necessary. *Matter of Attorney-General v. Atlantic Mutual Life Ins. Co.*, 100 N. Y. 279.

After property has passed into the possession of the receiver no lien can be acquired or action taken with reference thereto without leave of the court. *Attorney-General v. Continental Life Ins. Co.*, 28 Hun 360, *affd.*, no op., 93 N. Y. 630.

§ 234. Security of receiver. Before entering upon the duties of their appointment, such receiver shall give such security to the people of the state, and in such pen-

alty, as the court shall direct, conditioned for the faithful discharge of the duties of their appointment, and for the due accounting for all moneys received by them.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 66, in part. See Gen. Corp. Law, § 225 et seq.

§ 235. Authority of single receiver. When one receiver only, shall be appointed, all the provisions herein contained, in reference to several receivers shall apply to him.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 2.

§ 236. Authority where there is more than one receiver. When there are more receivers than one appointed, the debts and property of the corporation may be collected and received by any one of them; and when there are more than two receivers appointed, every power and authority conferred on the receivers may be exercised by any two of them.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 3.

§ 237. Surviving receivers. The survivor or survivors of any receivers shall have all the powers and rights given to receivers. All property in the hands of any receiver at the time of his death, removal or incapacity, shall be delivered to the remaining receiver or receivers, if there be any; or to the successor of the one so dying, removed or incapacitated; who may demand and sue for the same.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 4.

§ 238. Oath of receiver. Before proceeding to the discharge of any of their duties, all such receivers shall take and subscribe an oath, that they will well and truly execute the trust by their appointment reposed in them, according to the best of their skill and understanding; which oath shall be filed with the officer or court, that appointed them.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 5.

§ 239. **General powers of receivers.** The said receivers shall have power :

1. To sue in their own names or otherwise, and recover all the property, debts and things in action, belonging or due to such corporation in the same manner and with the like effect as such corporation might or could have done if no receivers had been appointed ; and no set-off shall be allowed in any such suit, for any debt, unless it was owing to such creditor, by such corporation before the appointment of the receiver of such corporation ; notwithstanding the notice to creditors the receivers may sue for and recover, any property or effects of the corporation and any debts due to it, at any time, before the day appointed for the delivery or payment thereof ;

2. To take into their hands, all the property of such corporation, whether attached, or delivered to them, or afterwards discovered ; and all books, vouchers and securities relating to the same ;

3. In the case of a non-resident, absconding or concealed debtor, to demand and receive of every sheriff who shall have attached any of the property of such debtor, or who shall have in his hands, any moneys arising from the sale of such property, all such property and moneys, on paying him his reasonable costs and charges, for attaching and keeping the same, to be allowed by the court having jurisdiction ;

4. From time to time, to sell at public auction, all the property, real and personal, vested in them, which shall come to their hands, after giving at least fourteen days' public notice of the time and place of sale, and also publishing the same for two weeks in a newspaper, printed in the county, where the sale shall be made, if there be one ;

5. To allow such credit on the sale of real property by them, as they shall deem reasonable, subject to the pro-

visions of this article for not more than three-fourths of the purchase money; which credit shall be secured by a bond of the purchaser, and a mortgage on the property sold;

6. On such sales, to execute the necessary conveyances and bills of sale;

7. To redeem all mortgages and conditional contracts and all pledges of personal property, and to satisfy any judgments, which may be an incumbrance on any property so sold by them; or to sell such property subject to such mortgages, contracts, pledges or judgments;

8. To settle all matters and accounts between such corporation and its debtors, or creditors, and to examine any person touching such matters and accounts, on oath, to be administered by either of them;

9. Under the order of the court appointing them, to compound with any person indebted to such corporation and thereupon to discharge all demands against such person.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 7, except last clause of ¶ 1, beginning "Notwithstanding," etc., from R. S., pt. 2, ch. 5, tit. 1, art. 8, § 10.

§ 240. Power of receiver to institute proceedings to recover assets. Whenever any receiver of a domestic corporation, or of the property within this state of any foreign corporation, shall have been appointed and qualified, as provided in articles five, six, seven, nine, eleven or twelve of this chapter either before, upon or after final judgment or order in the action or special proceeding in which such appointment was made, and shall, by his own verified petition, affidavit or other competent proof, show to the supreme court, at a special term thereof, held within the judicial district wherein such appointment was made, that he has good reason to believe that any officer, stockholder, agent or employee of such corporation, or any other person whomsoever, has embezzled or con-

cealed, or withholds or has in his possession or under his control, or has wrongfully disposed of, any property of such corporation which of right ought to be surrendered to the receiver thereof; or that any person can testify concerning the embezzlement, concealment, withholding, possession, control or wrongful disposition of any such property, the court shall make an order, with or without notice, commanding such person or persons to appear at a time and place to be designated in the order, before the court or before a referee named by the court for that purpose, and to submit to an examination concerning such embezzlement, concealment, withholding, possession, control or wrongful disposition of such property; and at the time of making such order or at any time thereafter, the court may, in its discretion, enjoin and restrain the person or persons so ordered to appear and be examined from in any manner disposing of any property of such corporation which may be in the possession or under the control of the person so ordered to be examined, until the further order of the court in relation thereto. No person so ordered to appear and be examined shall be excused from answering any question on the ground that his answer might tend to convict him of a criminal offense; but his testimony taken upon such examination shall not be used against him in any criminal action or proceeding.

Any person so ordered to appear and be examined shall be entitled to the same fees and mileage, to be paid at the time of serving the order, as are allowed by law to witnesses subpœnaed to attend and testify in an action in the supreme court, and shall be subject to the same penalties upon failure to appear and testify in obedience to such an order as are provided by law in the case of witnesses who fail to obey a subpœna to appear and testify in an action.

Any person appearing for examination in obedience to such order shall be sworn by the court or referee to tell the truth, and shall be entitled to be represented on such examination by counsel, and may be cross-examined, or may make any voluntary statement in his own behalf concerning the subject of his examination which may seem to him desirable or pertinent thereto.

The court before which such examination is taken, as well as the referee, if one be appointed for that purpose, shall have power to adjourn such examination from time to time, and may rule upon any question or objection arising in the course of such examination, to the same extent that might be done if the person so examined were testifying as a witness in the trial of an action.

When the examination of any person under such order shall be concluded, the testimony shall be signed and sworn to by the person so examined, and shall be filed in the office of the clerk of the county where the action is pending, or was tried, in which the receiver was appointed; and if from such testimony it shall appear to the satisfaction of the court that any person so examined is wrongfully concealing or withholding, or has in his possession or under his control, any property which of right belongs to such receiver, the court may make an order commanding the person so examined forthwith to deliver the same to such receiver, who shall hold the same subject to the further order of the court in relation thereto; and otherwise, the court may, at the conclusion of any such examination, make such final order in the premises as the interests of justice require.

Formerly L. 1898, ch. 534, §§ 1-5.

See Gen. Corp. Law, § 312, as to notice to Attorney-General.

§ 241. Power of receiver in the settlement of controversies. If any controversy shall arise between the receivers and any other person, in the settlement of any

demands against such corporation, or of debts due to such corporation the same may be referred to one or more indifferent persons, who may be agreed upon by the receivers and the party, with whom such controversy shall exist, by a writing to that effect, signed by them.

If such referee or referees be not selected by agreement, then the receivers or the other party to the controversy, provided no action at law is pending arising out of any such debts or demands, may serve a notice of their intention to apply to any judge of the supreme court at chambers, residing in the same district with said receivers, for the appointment of one or more referees, specifying the time and place when such application will be made, which notice shall be served at least ten days before the time so therein specified.

On the day so specified, upon due proof of the service of such notice, the judge before whom the application is made may, in his discretion, proceed to select one or more referees, the same in all respects as they are now selected according to the rules and practice of the supreme court.

When any witness to such controversy shall reside out of the county where the said receivers resided at the time of their appointment, the referee or referees appointed to hear said controversy shall have power to issue a commission or commissions in like manner as justices of the peace are now authorized to issue the same, and the testimony so taken shall be returned to said referee or referees in the same manner, and be read before them on a hearing, in like manner as testimony taken on commission before justices of the peace.

The officer before whom they shall be selected, shall certify such selection in writing. Such certificate, or the written agreement of the parties, shall be filed by the receivers in the office of a clerk of the supreme court,

and an order shall thereupon be entered by such clerk in vacation or in term, appointing the persons so selected to determine the controversy.

Such referees shall have the same powers, and be subject to the like duties and obligations, and shall receive the same compensation, as referees appointed by the supreme court, in personal actions pending therein.

The report of the referees shall be filed in the same office where the order for their appointment was entered, and shall be conclusive on the rights of the parties, if not set aside by the court.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, §§ 19-25; §§ 19, 22, as amended by L. 1862, ch. 373, §§ 1, 4; §§ 20, 21, as amended by L. 1907, ch. 476, § 1.

§ 242. Power of receiver to employ counsel. If the receiver of a corporation employs counsel he shall within three months after he has qualified as receiver enter into a written contract fixing the compensation of such counsel at not exceeding a certain amount or a certain percentage of the sums received and disbursed by him, which contract must be approved by the supreme court, on at least eight days' notice to the attorney-general. A payment by such receiver to his counsel on account of services shall only be made, pursuant to an order of the court, on notice to the attorney-general and subject to review on the final accounting. A contract with counsel shall not be made for a longer period than eighteen months, but may be renewed from time to time for periods of not more than one year, if approved by the supreme court on at least eight days' notice to the attorney-general. In case of the intervention of any policy-holder or depositor, by permission of the court, such policy-holder or depositor shall defray the legal expenses thereof, and no allowance shall be made for costs or fees to any attorney of such policy-holder or depositor. It shall be unlawful for receivers of an insurance, bank-

ing or railroad corporation, or trust company to pay to any attorney or counsel any costs, fees or allowances until the amounts thereof shall have been stated to the special term as provided in section two hundred and forty-nine of this chapter, as expenses incurred, and shall have been approved by that court, by an order of the court duly entered; and any such order shall be the subject of review by the appellate division and the court of appeals on an appeal taken therefrom by any party aggrieved thereby.

Formerly L. 1883, ch. 378, § 2a, added by L. 1906, ch. 349, § 2, from "If the receiver," to "in case of the intervention." Sentence beginning "In case of the intervention." L. 1883, ch. 378, § 5. Remainder of section, L. 1883, ch. 378, § 4, in part, as amended by L. 1896, ch. 139, § 1.

§ 243. Power of receiver to hold real property. A receiver, appointed by or pursuant to an order or a judgment, in an action in the supreme court or a county court, or in a special proceeding for the voluntary dissolution of a corporation, may take and hold real property, upon such trusts and for such purposes as the court directs, subject to the direction of the court, from time to time, respecting the disposition thereof.

Formerly Code Civ. Pro. § 716, in part. For remainder of section see Code Civ. Pro., § 716.

§ 244. Power of receiver to recover stock subscriptions. If there shall be any sum remaining due upon any share of stock subscribed in such corporation, the receiver shall immediately proceed to recover the same, unless the person so indebted shall be wholly insolvent; and for that purpose may commence and prosecute any action or proceeding for the recovery of such sum, without the consent of any creditors of such corporation.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 69.

§ 245. Duty of receiver to convert assets into money. The receivers shall, as speedily as possible, convert the

property, real and personal, of the corporation into money.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 26, in part.

§ 246. Duty of receiver as to private sales. A receiver duly appointed in this state by and pursuant to a judgment in an action, or by and pursuant to an order in a special proceeding, may, upon application to the court by which such judgment was rendered, or such order was made, and upon notice to such parties as may be entitled to notice of applications made in such action or special proceeding, be authorized by the said court to sell or convey the property, whether real or personal, of the corporation of which he is the receiver, at private sale, upon such terms and conditions as the court may direct.

Formerly L. 1898, ch. 522, § 1.

§ 247. Duty of receiver to keep accounts. They shall keep a regular account of all moneys received by them as receivers; to which, every creditor, or other person interested therein, shall be at liberty, at all reasonable times, to have recourse.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 26, in part.

§ 248. Duty of receiver to serve copy of report upon attorney-general and superintendent of banks. All receivers of insolvent corporations who are required by law to make and file reports of their proceedings shall at the time of making and filing such reports, serve a copy thereof upon the attorney-general of this state, and receivers of such corporations as report to, and are under the supervision of, the banking department shall on the first day of January and July of each year, during the continuance of their respective trusts, file with the superintendent of banks a report, verified by oath, in such

form as the superintendent may prescribe, showing the condition of their respective trusts. In case any receiver of an insolvent corporation shall neglect to make and file a report of his proceedings for thirty days after the time he is required by law to make and file such report, or shall neglect for the same length of time to serve a copy thereof on the attorney-general, as required by this section the attorney-general may make a motion in the supreme court for an order to compel the making and filing and serving a copy on him of such report, or for the removal of such receiver from his office.

Formerly L. 1880, ch. 537, § 1, as am'd by L. 1881, ch. 639, § 1. Last sentence, L. 1880, ch. 537, § 2.

§ 249. Duty of certain receivers to make reports. It shall be the duty of every receiver of an insurance, banking or railroad corporation, or trust company, to present every six months to the special term of the supreme court, held in the judicial district wherein the place of trial or venue of the action or special proceeding in which he was appointed may then be, on the first day of its first sitting, after the expiration of such six months, and to file a copy of the same, if a receiver of a bank or trust company, with the superintendent of banks; if a receiver of an insurance company, with the superintendent of insurance; and in each case with the attorney-general, an account exhibiting in detail the receipts of his trust, and the expenses paid and incurred therein during the preceding six months. Of the intention to present such account, as aforesaid, the attorney-general, and also the surety or sureties on the official bond of such receiver, shall be given eight days' notice in writing; and the attorney-general shall examine the books and accounts of such receiver at least once every twelve months.

Formerly L. 1883, ch. 378, § 4, in part, as amended by L. 1885, ch. 40, § 1, and L. 1896, ch. 139, § 1.

§ 250. Duty of receivers to give notice to creditors. The receivers immediately upon their appointment, shall give notice thereof which shall be published for three weeks in a newspaper printed in the county where the principal place of conducting the business of such corporation shall have been situated; and therein shall require,

1. All persons indebted to such corporation, by a day and at a place therein to be specified, to render an account of all debts and sums of money owing by them respectively, to such receivers and to pay the same.

2. All persons having in their possession any property or effects of such corporation to deliver the same to the said receivers by the day so appointed.

3. All the creditors of such corporation to deliver their respective accounts and demands to the receivers or one of them, by a day to be therein specified, not less than forty days from the first publication of such notice.

4. All persons holding any open or subsisting contract of such corporation, to present the same in writing and in detail to such receivers, at the time and place in such notice specified.

Thus am'd by L. 1909, ch. 28. Paragraphs 1-3, formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 8. Paragraph 4, R. S., pt. 3, ch. 8, tit. 4, art. 3, § 70.

§ 251. Delivery of property and payment of debts to receiver after notice. After the first publication of the notice of the appointment of receivers, every person having the possession of any property belonging to such corporation, and every person indebted to such corporation, shall account and answer for the amount of such debt and for the value of such property to the said receivers.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 72, in part.

§ 252. Penalty for concealing property from receiver. Every person indebted to such corporation, or having the

possession or custody of any property or thing in action, belonging to it, who shall conceal the same, and not deliver a just and true account of such indebtedness, or not deliver such property or thing in action, to the receivers, or one of them, by the day for that purpose appointed, shall forfeit double the amount of such debt, or double the value of such property so concealed; which penalties may be recovered by the receivers.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 11.

§ 253. Duty of receiver to call creditors' meeting. They shall call a general meeting of the creditors of such corporation, within four months from the time of their appointment by a notice to be published in the same manner, as hereinbefore directed respecting the publication of the notice of their appointment; in which notice, they shall specify the place and time of such meeting, which time shall not be more than three months, nor less than two months after the first publication of such notice. Every such notice shall be published at least once in each week, until the time of such meeting.

First clause to "time of their appointment," formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 74, in part. Remainder formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 27.

§ 254. Proceedings at creditors' meeting. At such meeting, or other adjourned meeting thereafter, all accounts and demands for and against such corporation, and all its open and subsisting contracts, shall be ascertained and adjusted as far as may be, and the amount of moneys in the hands of the receivers declared.

From "At such meeting" to "thereafter," formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 28, in part. Remainder formerly R. S., pt. 3, ch. 8, tit. 4, art. 8, § 74, in part.

§ 255. Deduction of disbursements and commissions by receiver. Out of the moneys in their hands the receivers may first deduct all the necessary disbursements

made by them in the discharge of their duty and such commissions as may be allowed by law.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 29.

§ 256. Refunding consideration of subsisting contracts.

If there shall be any open and subsisting engagements or contracts of such corporation, which are in the nature of insurances or contingent engagements of any kind, the receivers may, with the consent of the party holding such engagement, cancel and discharge the same, by refunding to such party the premium or consideration paid thereon by such corporation, or so much thereof as shall be in the same proportion to the time which shall remain of any risk assumed by such engagement, as the whole premium bore to the whole term of such risk; and upon such amount being paid by such receivers to the person holding or being the legal owner of such engagement, it shall be deemed canceled and discharged as against such receivers.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 75.

§ 257. Retention of funds for subsisting contracts and pending suits. The receivers shall retain out of the moneys in their hands, a sufficient amount to pay the sums, which they are hereinbefore authorized to pay, for the purpose of canceling and discharging any open or subsisting engagements. If any suit be pending against the corporation or against the receivers, for any demand, the receivers may retain the proportion which would belong to such demand if established, and the necessary costs and proceedings, in their hands, to be applied according to the event of such suit, or to be distributed in a second or other dividend.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, §§ 77, 78.

§ 258. Payment of debts not due. Every person to whom a corporation shall be indebted on a valuable con-

sideration, for any sum of money not due at the time of such distribution, but payable afterwards, shall receive his proportion with other creditors, after deducting a rebate of legal interest upon the sum distributed, for the time unexpired of such credit.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 35.

§ 259. Allowance of set-offs. Where mutual credit has been given by any corporation, and any other person, or mutual debts have subsisted between such corporation and any other person, the receivers may set off such credits or debts, and pay the proportion or receive the balance due. But no set-off shall be allowed of any claim or debt, which would not have been entitled to a dividend, as hereinbefore directed.

No set-off shall be allowed by such receivers, of any claim or debt, which shall have been purchased by, or transferred to, the person claiming its allowance, which could not have been set off by him, in a suit brought by such receivers.

First paragraph formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 36.
Second paragraph formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 37.

§ 260. Penalties recovered by receiver. All penalties which shall be recovered by any receivers, pursuant to the provisions of this article, shall be deemed a part of the property of the corporation, and shall be distributed as such among its creditors.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 39.

§ 261. Order of payment by receiver. The receivers shall distribute the residue of the moneys in their hands, among all those who shall have exhibited their claims as creditors, and whose debts shall have been ascertained, as follows:

1. All debts due by such corporation to the United States, and all debts entitled to a preference under the laws of the United States.

2. All debts that may be owing by the corporation as guardian, executor, administrator or trustee; and if there be not sufficient to pay all debts of the character above specified, then a distribution shall be made among them, in proportion to their amounts respectively.

3. Judgments actually obtained against such corporation, to the extent of the value of the real estate on which they shall respectively be liens.

4. All other creditors of such corporation, in proportion to their respective demands, without giving any preference to debts due on specialties.

First clause to colon (:) formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 79, in part; subd. 1, "All debts due by such corporation to the United States and," R. S., pt. 2, ch. 5, tit. 1, art. 8, § 32; subd. 1, "all debts entitled to a preference under the laws of the United States," R. S., pt. 3, ch. 8, tit. 4, art. 3, § 79, in part; subd. 2, R. S., pt. 2, ch. 5, tit. 1, art. 8, § 34; subds. 3 and 4, R. S., pt. 3, ch. 8, tit. 4, art. 3, § 79, in part.

The wages of employees of domestic corporations doing business in the State are preferred to every other debt or claim. Labor Law, § 9 (Cons. Laws, ch. 31; L. 1909, ch. 36).

§ 262. Failure to file claim before first dividend. Every creditor who shall have neglected to exhibit his demand before the first dividend, and who shall deliver his account to the receivers before the second dividend, shall receive the sum he would have been entitled to on the first dividend, before any distribution be made to the other creditors.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 81, in part.

§ 263. Second dividend by receiver. If the whole of the property of such corporation be not distributed on the first dividend, the receivers shall, within one year thereafter, make a second dividend of all the moneys in their hands, among the creditors entitled thereto; of which, and that the same will be a final dividend, three weeks' notice shall be inserted once in each week in a newspaper printed in the county where the principal place of business of such corporation was situated.

Such second dividend shall be made in all respects in the same manner as herein prescribed in relation to the first dividend, and no other shall be made thereafter among the creditors of such corporation, except to the creditors having suits against it, or against the receivers, pending at the time of such second dividend, and except of the moneys which may be retained to pay such creditors, as herein provided.

First paragraph formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 80.
Second paragraph formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 81, in part.

§ 264. Surplus to stockholders. If after the second dividend is made, there shall remain any surplus in the hands of the receivers, they shall distribute the same among the stockholders of such corporation, in proportion to the respective amounts paid in by them, severally, on their shares of stock.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 83.

§ 265. Disposition of moneys retained by receiver for suits. When any suit pending at the time of the second dividend shall be terminated, they shall apply the moneys retained in their hands for that purpose, to the payment of the amount recovered, and their necessary charges and expenses; and if nothing shall have been recovered, they shall distribute such moneys, after deducting their expenses and costs, among the creditors and stockholders of the corporation, in the same manner as herein directed in respect to a second dividend.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 84.

§ 266. Duty of receiver as to unclaimed dividend. If any dividend that shall have been declared, shall remain unclaimed by the person entitled thereto for one year after the same was declared, the receivers shall consider it as relinquished, and shall distribute it, on any subsequent dividend, among the other creditors.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 42.

§ 267. Effect of failure to file claim before second dividend. After such second dividend shall have been made, the receivers shall not be answerable to any creditor of such corporation, or to any person having claims against such corporation, by virtue of any open or subsisting engagement, unless the demands of such creditor shall have been exhibited, and the engagements upon which such claims are founded, shall have been presented to the said receivers, in detail and in writing, before or at the time specified by them in their notice of a second dividend.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 82.
See Gen Corp. Law, § 303.

§ 268. Final accounting by receiver. A receiver shall apply within one year after qualifying as such for a final settlement of his accounts and an order for distribution, or shall apply to the court upon notice to the attorney-general for an extension of time, setting forth the reasons why he is unable to close his accounts, which order may be granted in the discretion of the court. The attorney-general or any creditor, or any party interested, may apply for an order that the receiver show cause why an accounting and distribution shall not be had at any time after the expiration of one year after the receiver qualifies; and it shall be the duty of the attorney-general after the expiration of eighteen months from the time the receiver enters upon his duties, in case he has not applied for a final settlement of his accounts, to apply for such an order on notice to such receiver. In case of such application by a party other than the receiver the court shall direct the receiver to take steps to account with all convenient speed. The receiver is not required or authorized to file any account, except as herein provided, except by special order of the court.

Formerly Code Civ. Pro. § 2431b, added by L. 1906, ch. 293, § 2.

§ 269. Notice of final accounting. Previous to rendering such account the receivers shall insert a notice of their intention to present the same, once in each week, for three weeks, in a newspaper, of the county in which notices of dividends are herein required to be inserted, specifying the time and place at which such account will be rendered. Said receivers shall also give notice to the sureties on their official bonds, as provided in section two hundred and twenty-seven of this chapter.

Thus am'd by L. 1909, ch. 240.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 87.

§ 270. Hearing on final accounting. Upon the coming in of such report, the court shall hear the allegations of all concerned therein, and shall allow or disallow such account, and decree the same to be final and conclusive upon all the creditors of such corporation, upon all persons who have claims against it, upon any open or subsisting engagement, and upon all the stockholders of such corporation.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 89, in part.

§ 271. Reference of final account. The referee to whom such account shall be referred, shall hear and examine the proofs, vouchers and documents offered for or against such account, and shall report thereon fully to the court.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 88.

§ 272. Further accounting. Such receivers shall also account from time to time in the same manner, and with the like effect, for all moneys which shall come to their hands after the rendering of such account, and for all moneys which shall have been retained by them for any of the purposes hereinbefore specified, and shall pay into court all unclaimed dividends.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 89, in part.

§ 273. Removal of receiver. Such receivers may be removed by the court.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 85, in part.

§ 274. Vacancy. Any vacancy created by removal, death or otherwise, may be supplied by the court.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 85, in part.

§ 275. Renunciation by receiver. Any receiver who shall be desirous of renouncing the trust vested in him, may apply to the court from whom his appointment was received, for an order to all persons interested, to show cause why such renunciation should not be accepted.

Such application shall be accompanied by a full, true and just account of all the transactions of such receiver, and particularly of the property, moneys and effects received by him; of all payments made, whether to creditors or otherwise; and of the remaining effects and property of the corporation, in respect to which he was appointed receiver, within his knowledge, and the situation of the same.

To such account shall be annexed the affidavit of the receiver, that the said account is in all respects just and true, according to the best of his knowledge and belief; which affidavit shall be subscribed and sworn to, before the court, to whom the application is made, and shall be certified by the clerk of the court.

Such court, shall thereupon grant an order, directing notice to be given to all persons interested in the property of the corporation, in respect to which such receiver was appointed, to show cause on a day or at a term and at a place therein to be specified, why he should not be permitted to renounce his appointment.

Such notice shall be published, once in each week, for six weeks successively in such newspapers, as such court shall direct.

On the day appointed for such hearing, and on such other days as shall from time to time be appointed, if it shall appear that notice was duly published, the court shall proceed to hear the proofs and allegations of the parties.

If it shall appear that the proceedings of such receiver, in relation to his trust, have been fair and honest, and particularly in the collection of the property and debts vested in him; and if such court be satisfied that for any reason it is inexpedient for such receiver to continue in the execution of the duties of his appointment, and that such duties can be executed by another receiver, without injury to the property of the corporation, or to the creditors; and if no good cause to the contrary appear, such court shall grant an order, allowing such receiver to renounce his appointment.

Upon such order being granted, such receiver shall be discharged from the trust reposed in him, and his power and authority shall thereupon cease; but he shall, notwithstanding, remain subject to any liability he may have incurred, at any time previous to the granting of such order, in the management of his trust.

The expense of all proceedings in effecting such renunciation shall be paid by the receiver making the application.

Thus am'd by L. 1909, ch. 28.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, §§ 49, 51, 52, 53, 54, 55, 56, 60, 62.

§ 276. Control of receiver by court. The receivers shall be subject to the control of the court and may be compelled to account at any time.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 85, in part.

§ 277. Commissions and expenses of receiver in voluntary dissolution. A receiver appointed pursuant to article nine is entitled, in addition to his necessary ex-

penses, to commissions upon the sums received and disbursed by him as the court by which or the judge by whom he is appointed allows, as follows: On the first twenty thousand dollars not exceeding five per centum; on the next eighty thousand dollars, not exceeding two and one-half per centum; and on the remainder, not exceeding one per centum; but in case the commissions of a receiver so computed shall not amount to one hundred dollars, said court or judge may in his or its discretion allow said receiver such a sum not exceeding one hundred dollars for his commissions as shall be commensurate with the services rendered by said receiver.

Formerly Code Civ. Pro. § 2431a, added by L. 1906, ch. 293, § 2.

§ 278. Commissions and expenses of receiver except in voluntary dissolution. A receiver of a corporation, except a receiver appointed in proceedings for its voluntary dissolution, is entitled, in addition to his necessary expenses, to such commissions, not exceeding two and one-half per centum upon the sums received and disbursed by him, as the court by which or the judge by whom he is appointed allows, but except upon a final accounting such a receiver shall not receive on account of his services for any one year a greater amount than twelve thousand dollars, nor for any period less than a year more than at that rate. Upon final accounting, the court may make an additional allowance to such receiver, not exceeding two and one-half per centum upon the sums received and disbursed by him, if the court is satisfied that he has performed services that fairly entitle him to such additional allowance. Where more than one receiver shall be appointed, the compensation herein provided shall be divided between said receivers.

Formerly L. 1883, ch. 378, § 2, as am'd by L. 1886, ch. 275, § 1; L. 1901, ch. 506, § 1; L. 1906, ch. 349, § 1.

ARTICLE 12

Provisions Applicable to Two or More of the Foregoing Proceedings or Actions.

- Section 300. Application of preceding articles to certain corporations.
301. Officers and agents may be compelled to testify in certain actions.
302. Injunction staying actions by creditors in certain actions.
303. Creditors of corporation may be brought in to prove their claims in certain actions.
304. When attorney-general must bring certain actions.
305. Requisites of injunction against corporations in certain cases.
306. Appointment of receivers of property of corporations.
307. Judicial suspension or removal of officer of corporation.
308. Application of the last three sections.
309. Misnomer not available in action against stockholder.
310. Appraisal of property of insolvent corporation.
311. Application by attorney-general for removal of receiver and to facilitate closing affairs of receivership.
312. Service of papers upon attorney-general.
313. Designation of depositories of funds in order appointing receiver.
314. Application to the court in certain actions and proceedings.
315. County wherein action may be brought by attorney-general on behalf of the people.
316. Preferences in actions *of proceedings by or against receivers.

§ 300. Application of preceding articles to certain corporations. Articles fifth, sixth or seventh of this chapter do not apply to a religious corporation; or to a municipal or other political corporation, created by the constitution, or by or under the laws of this state; or to any corporation which the regents of the university have power to dissolve, except upon the application of the regents, or of the trustees of such a corporation; and in aid of its liquidation under such dissolution.

Formerly Code Civ. Pro. § 1804.

* So in original.

§ 301. Officers and agents may be compelled to testify in certain actions. In an action, brought as prescribed in article fifth, sixth or seventh, a stockholder, officer, alienee, or agent of a corporation, is not excused from answering a question, relating to the management of the corporation, or the transfer or disposition of its property, on the ground that his answer may expose the corporation to a forfeiture of any of its corporate rights, or will tend to convict him of a criminal offense, or to subject him to a penalty or forfeiture. But his testimony shall not be used, as evidence against him, in a criminal action or special proceeding.

Formerly Code Civ. Pro. § 1805.

§ 302. Injunction staying actions by creditors in certain actions. In such an action, the court may, in its discretion, on the application of either party, at any stage of the action, before or after final judgment, and with or without security, grant an injunction order, restraining the creditors of the corporation from bringing actions against the defendants, or any of them, for the recovery of a sum of money, or from taking any further proceedings in such actions, theretofore commenced. Such an injunction has the same effect, and, except as otherwise expressly prescribed in this section, is subject to the same provisions of law, as if each creditor, upon whom it is served, was named therein, and was a party to the action in which it is granted.

Formerly Code Civ. Pro. § 1806.
See Gen. Corp. Law, § 184.

§ 303. Creditors of corporation may be brought in to prove their claims in certain actions. In such an action, the court may, at any stage of the action, before or after final judgment, make an order requiring all the creditors of the corporation to exhibit and prove their claims, and thereby make themselves parties to the action, in such a

manner, and in such a reasonable time, not less than six months from the first publication of notice of the order as the court directs; and that the creditors, who make default in so doing, shall be precluded from all benefit of the judgment, and from any distribution which may be made thereunder, except as hereinafter provided. Notice of the order must be given by publication, in such newspapers, and for such a length of time, as the court directs. Notwithstanding such order any such creditor who shall exhibit and prove his claim in the manner directed thereby, with proof, by affidavit or otherwise, that he has had no notice or knowledge thereof in time to comply therewith, any time before an order is made directing a final distribution of the assets of such corporation, shall be entitled to have his claim received, and shall have the same rights and benefits thereon, so far as the assets of such corporation then remaining undistributed may render possible, as if his claim had been exhibited and proved within the time limited by such order.

Formerly Code Civ. Pro. § 1807.

§ 304. When attorney-general must bring certain actions. Where the attorney-general has good reason to believe, that an action can be maintained in behalf of the people of the state, as prescribed in articles fifth, sixth or seventh of the chapter, except section one hundred and thirty of this chapter, he must bring an action accordingly, or apply to a competent court for leave to bring an action, as the case requires; if, in his opinion, the public interests require that an action should be brought. In a case where the action can be brought only by the attorney-general in behalf of the people, if a creditor, stockholder, director, or trustee of the corporation, applies to the attorney-general for that purpose, and furnishes the security required by law, the attorney-general must bring the action, or apply for leave to bring it, if he

has good reason to believe, that it can be maintained. Where such an application is made section nineteen hundred and eighty-six of the code of civil procedure applies thereto, and to the action brought in pursuance thereof.

Formerly Code Civ. Pro. § 1808.

§ 305. Requisites of injunction against corporations in certain cases. An injunction order, suspending the general and ordinary business of a corporation, or suspending from office, or restraining from the performance of his duties, a trustee, director, or other officer thereof, can be granted only by the court, upon notice of the application therefor, to the proper officer of the corporation, or to the trustee, director, or other officer enjoined. If such an injunction order is made, otherwise than as prescribed in this section, it is void.

Formerly Code Civ. Pro. § 1809, in part.

§ 306. Appointment of receivers of property of corporations. A receiver of the property of a corporation can be appointed only by the court, and in one of the following cases:

1. An action, brought as prescribed in articles fifth, sixth or seventh of this chapter.

2. An action brought for the foreclosure of a mortgage upon the property, of which the receiver is appointed, where the mortgage debt, or the interest thereupon, has remained unpaid, at least thirty days after it was payable, and after payment thereof was duly demanded of the proper officer of the corporation and where either the income of the property is specifically mortgaged, or the property itself is probably insufficient to pay the mortgage debt.

3. An action brought by the attorney-general, or by a stockholder, to preserve the assets of a corporation, having no officer empowered to hold the same.

4. A special proceeding for the voluntary dissolution of a corporation.

5. Upon the application of the regents of the university, in aid of the liquidation of a corporation whose dissolution they contemplate or have decreed; or upon the application of the trustees of such a corporation, with notice to the regents.

Where the receiver is appointed in an action, otherwise than by or pursuant to a final judgment, notice of the application for his appointment must be given to the proper officer of the corporation.

Formerly Code Civ. Pro. § 1810.

§ 307. Judicial suspension or removal of officer of corporation. A trustee, director, or other officer of a corporation shall not be suspended or removed from office, by a court or judge, otherwise than by the final judgment of a competent court, in an action brought by the attorney-general, as prescribed in section ninety of this chapter.

Formerly Code Civ. Pro. § 1811.

§ 308. Application of the last three sections. The last three sections apply to an action or special proceeding, against a corporation created by or under the laws of the state, or a trustee, director, or other officer thereof; or against a corporation created by or under the laws of another state, government, or country, or a trustee, director, or other officer thereof, where the corporation does business within the state, or has, within the state, a business agency or a fiscal agency, or an agency for the transfer of its stock.

Formerly Code Civ. Pro. § 1812, in part. For remainder of section see Code Civ. Pro. § 1812.

§ 309. Misnomer not available in action against stockholder. Where an action, authorized by a law of the state, is brought against one or more persons, as stock-

holders of a corporation, an objection to any of the proceedings can not be taken, by a person properly made a defendant in the action on the ground that the plaintiff has joined with him, as a defendant in the action, a person, whose name appears on the stock-books of the corporation, as a stockholder thereof, by the name so appearing; but who is misnamed, or dead, or is not liable for any cause. In such a case, the court may, at any time before final judgment, upon motion of either party, amend the pleadings and other papers, without prejudice to the previous proceedings, by substituting the true name of the person intended, or by striking out the name of the person who is dead, or not liable, and, in a proper case, inserting the name of his representative or successor.

Formerly Code Civ. Pro. § 1813, in part. For remainder of section see Code Civ. Pro. § 1813.

§ 310. Appraisal of property of insolvent corporation. Whenever by reason of the provisions of any law of this state it shall become necessary to appraise in whole or in part the property of any corporation in the hands of a receiver or otherwise, the persons whose duty it shall be to make such appraisal shall value the real estate at its full and true value, taking into consideration actual sales of neighboring real estate similarly situated during the year immediately preceding the date of such appraisal, if any; and they shall value all such property, stocks, bonds or securities as are customarily bought or sold in open markets in the city of New York or elsewhere, for the day on which such appraisal or report may be required, by ascertaining the range of the market and the average of prices as thus found, running through a reasonable period of time.

Formerly L. 1891, ch. 34, § 1.

§ 311. Application by attorney-general for removal of receiver and to facilitate closing affairs of receiver-

ship. The attorney-general may, at any time he deems that the interests of the stockholders, creditors, policyholders, depositors or other beneficiaries interested in the proper and speedy distribution of the assets of any insolvent corporation will be subserved thereby, make a motion in the supreme court at a special term thereof, in any judicial district:

1. For an order removing the receiver of any insolvent corporation and appointing a receiver thereof in his stead, or,

2. To compel him to account, or,

3. For such other and additional order or orders as to him may seem proper to facilitate the closing up of the affairs of such receivership, and

Any appeal from any order made upon any motion under this section shall be to the appellate division of the department in which such motion is made.

Formerly L. 1883, ch. 378, § 7.

§ 312. Service of papers upon attorney-general. A copy of all motions and all motion papers, and a copy of any other application to the court, together with a copy of the order or judgment to be proposed thereon to the court, in every action or proceeding for the dissolution of a corporation or a distribution of its assets, shall, in all cases, be served on the attorney-general, in the same manner as provided by law for the service of papers on attorneys who have appeared in actions, whether the applications but for this section would be ex parte or upon notice, and no order or judgment granted shall vary in any material respect from the relief specified in such copy, order or judgment, unless the attorney-general shall appear on the return day and shall have been heard in relation thereto; and any order or judgment granted in any action or proceeding aforesaid, without such service of such papers upon the attorney-

general, shall be void, and no receiver of any such corporation shall pay to any person any money directed to be paid by any order or judgment made in any such action or proceeding, until the expiration of eight days after a certified copy of such order or judgment shall have been served as aforesaid upon the attorney-general.

Formerly L. 1883, ch. 378, § 8.

§ 313. Designation of depositories of funds in order appointing receiver. All orders appointing receivers of corporations shall designate therein one or more places of deposit, wherein all funds of the corporation not needed for immediate disbursement shall be deposited and no deposits or investments of such trust funds shall be made elsewhere, except upon the order of the court upon due notice given to the attorney-general.

Formerly L. 1883, ch. 378, § 3.

§ 314. Application to the court in certain actions and proceedings. All applications to the court shall be made in the judicial district where the principal office of the corporation against which proceedings are taken is located, excepting such applications as are made in actions brought by the attorney-general on behalf of the people of the state, and all such applications shall be made in the judicial district in which the action is triable.

Formerly L. 1883, ch. 378, § 9, as am'd by L. 1896, ch. 282, § 2.

See Gen. Corp. Law, § 3, subd. 10, and §§ 108 and 183; also Bus. Corp. Law, § 2, subd. 5.

§ 315. County wherein action may be brought by attorney-general on behalf of the people. An action or proceeding brought by the attorney-general on behalf of the people of the state against any corporation for the purpose of procuring its dissolution, the appointment of a receiver, or the sequestration of its property, may be brought in any county of the state, to be designated by the attorney-general.

Formerly L. 1883, ch. 378, § 1, in part, as am'd by L. 1896, ch. 282, § 1.

§ 316. Preferences in actions or proceedings by or against receivers. All actions or other legal proceedings and appeals therefrom or therein brought by or against a receiver of any of the insolvent corporations referred to in this chapter, shall have a preference upon the calendars of all courts next in order to actions or proceedings brought by the people of the state of New York.

Formerly L. 1883, ch. 378, § 10.

ARTICLE 13

Alteration and Repeal of Charter of Corporation

Section 320. Alteration and repeal of charter.

321. Conflicting corporate laws.

§ 320. Alteration and repeal of charter. The charter of every corporation shall be subject to alteration, suspension and repeal, in the discretion of the legislature.

The State Constitution, as adopted in 1846 and as revised in 1894, provides as follows: "Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general and special acts passed pursuant to this section may be altered from time to time or repealed." Const., art. 8, § 1. The necessity for a special act is entirely within the judgment of the Legislature not open to judicial review. *Met. Bank v. Van Dyck*, 27 N. Y. 400. Prior thereto the Revised Statutes, passed in 1827, provided that "The charter of every corporation, that shall hereafter be granted by the legislature, shall be subject to alteration, suspension and repeal, in the discretion of the legislature." This statutory provision was repealed in 1890, but it was thought that the Legislature, by such repeal, might have relinquished its control of charters of corporations organized during the interval subsequent to the Revised Statutes and prior to 1846. The statutory provision was, therefore, re-enacted by Laws of 1895, ch. 672, as section 40 of the General Corporation Law (now section 320). When this provision was first inserted in the Revised Statutes it was the result of public alarm and protest caused by the

decision of the United States Supreme Court in the celebrated case of *Trustees of Dartmouth College v. Woodward*, 4 Wheaton 518. This statute became the permanent policy of the State when the Constitution of 1846 was adopted. In the *Dartmouth College* case the court held that if a State wished to alter charters it must reserve the right to do so.

The reservation becomes a part of the charter of every corporation, whether organized under a general act or by special statute, thus preventing it from becoming irrevocable. *Lord v. Equitable Life Assur. Soc.*, 194 N. Y. 212; *Pratt v. City of N. Y.*, 183 N. Y. 151.

§ 321. Conflicting corporate laws. If in any corporate law there is or shall be any provision in conflict with any provisions of this chapter or of the stock corporation law, the provisions so conflicting shall prevail, and the provision of this chapter or of the stock corporation law with which it conflicts shall not apply in such a case. If in any such law there is or shall be a provision relating to a matter embraced in this chapter or in the stock corporation law, but not in conflict with it, such provision in such other law shall be deemed to be in addition to the provision in this chapter or in the stock corporation law relating to the same subject-matter, and both provisions shall, in such case, be applicable.

Provisions in the Business Corporations Law, the Transportation Corporations Law and the Railroad Law similar to and not in conflict with the provisions of the General Corporation Law and the Stock Corporation Law, must be deemed to be in addition to the provisions of said last-mentioned laws. *Oelbermann v. N. Y. & Northern Ry. Co.*, 77 Hun 332.

Repeal by Implication.

A repeal of statutes by implication is not favored in the law; and when both the latter and former statute can stand together, both will stand unless the former is expressly repealed, or the legislative intent to repeal it is very manifest. *Peo. ex rel. Kingsland v. Palmer*, 52 N. Y. 83, 88; *Davis v. Supreme Lodge Knights of Honor*, 165 N. Y. 159.

Where it is intended to alter or repeal an existing statutory enactment, the act itself should contain provisions to that effect, or it should be plainly manifest that such was the design, by the latter act being repugnant to and inconsistent with the former. *Mark et al. v. The State*, 97 N. Y. 578; *Coxe v. The State*, 144 N. Y. 396.

A repeal by implication because of inconsistency or repugnancy should never be declared where a reasonable construction will harmonize statutes alleged to be conflicting. *Peo. ex rel. Woods v. Crissey*, 91 N. Y. 632.

The invariable rule of construction in respect to the repealing of statutes by implication, is, that the earliest act remains in force, unless the two are manifestly inconsistent with and repugnant to each other, or, unless in the latest act, some express notice is taken of the former, plainly indicating an intention to abrogate it. *Bowen v. Lease*, 5 Hill 226.

Although a statute is not expressly repealed by a subsequent enactment upon the same subject, yet, if it appears by the latter statute that it was intended to cover the subject-matter of the former, the prior statute will be deemed by implication to have been repealed. *Peo. v. Vosburgh*, 76 Hun 562; *In re N. Y. Institution for Deaf, etc.*, 121 N. Y. 234.

When a statute amends a former statute "so as to read as follows," it operates as a repeal by implication of inconsistent provisions in the former law, and of provisions omitted in the amended law. *In re Estate of Prime*, 136 N. Y. 347; *Guaranty Trust Co. v. Troy Steel Co.*, 33 Misc. 484.

ARTICLE 14

Laws Repealed; Construction; When to Take Effect

Section 330. Laws repealed.

331. Construction.

332. When to take effect.

§ 330. **Laws repealed.** Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

The words "such repeal shall not revive a law repealed by any law hereby repealed, but shall include all laws amendatory of the laws hereby repealed," which were contained in the former section 34 of the General Corporation Law, were omitted by the Consolidated Laws from the foregoing section and were re-enacted into the General Construction Law.

Reviver of Repealed Statutes.

A legislative intent to revive a law which has, by legislative action, already been wholly annihilated, is not alone sufficient to accomplish such revival; there must be some legislative expression using language equivalent to a re-enactment. *Bank of Metropolis v. Faber*, 150 N. Y. 200; *Same v. Same*, 1 App. Div. 341, disapproving *Ottman v. Hoffman*, 7 Misc. 714, *infra*.

The effect of the repeal of a repealing law is to restore the law repealed by the latter, in the absence of a contrary intention expressly declared or necessarily to be implied. *Ottman v. Hoffman*, 7 Misc. 714, and cases there cited.

§ 331. Construction. Nothing in this chapter shall be construed to impair any right or liability which any existing corporation, its officers, directors, stockholders or creditors may have or be subject to or which any such corporation, other than a railroad corporation, had or was subject to on the date when this chapter takes effect, by virtue of any special act of the legislature creating such corporation or creating or defining any such right or liability, unless such special act is repealed by this chapter or the other general laws hereinbefore mentioned.

Matter contained in former section 36 of the General Corporation Law and omitted from this section has been enacted as part of the General Construction Law.

The Legislature has power, without violating the Federal Constitution, to repeal or amend laws pertaining to business or stock corporations formed under the law of 1875, and to prescribe the liability of stockholders in such corporations to its creditors for debts contracted after the act was repealed or amended. *Berwind-White Coal Mining Co. v. Ewart*, 11 Misc. 490, *affd.*, 90 Hun 60.

The saving and construction clauses of the Stock Corp. Law of 1890, ch. 564, §§ 71, 72, which preserved under that law an existing liability of stockholders under the Manufacturing Act of 1848, ch. 40, were not embodied in the amended Stock Corp. Law of 1892, ch. 688, but the equivalent thereof was accomplished by inserting these clauses in the Stat. Const. Law of 1892, ch. 677, §§ 31, 32, and continued the liability of stockholders theretofore existing into the new and amended law. *Close v. Potter*, 155 N. Y. 145, *revsg.* 11 Misc. 729.

§ 332. When to take effect. This chapter shall take effect immediately.

Section 35 of the former General Corporation Law, containing a saving clause, was omitted from this law in the enactment of the Consolidated Laws because similar provisions were embodied in the General Construction Law, § 93.

SCHEDULE OF LAWS REPEALED.

Revised Statutes, Part 1, chapter 18 All

Revised Statutes, Part 3, chapter 8, title 4, sections 2, 42

Revised Statutes, Part 3, ch. 8, title 4, article 3, §§ 66-91

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1815...	202...	All	1851...	107...	All
1816...	58...	All	1851...	487...	All
1817...	223...	All	1851...	497...	All
1818...	67...	All	1852...	228...	All
1819...	102...	All	1852...	372...	All
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1838...	262...	All	1853...	502...	All
1839...	218...	All	1853...	626...	All
1842...	165...	All	1854...	3...	All
1846...	155...	All	1854...	87...	All
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1847...	210...	All	1854...	232...	All
1847...	222...	All	1854...	269...	All
1847...	270...	All	1854...	282...	All
1847...	272...	All	1854...	312...	All
1847...	287...	All	1855...	301...	All
1847...	398...	All	1855...	302...	All
1847...	404...	All	1855...	390...	All
1847...	405...	All	1855...	478...	All
1848...	37...	All	1855...	485...	All
1848...	40...	All	1855...	495...	All
1848...	45...	All	1855...	546...	All
1848...	140...	All	1855...	559...	All
1848...	259...	All	1856...	65...	All
1848...	265...	All	1857...	29...	All
1848...	360...	All	1857...	83...	All
1849...	250...	All	1857...	185...	All
1849...	362...	All	1857...	202...	All
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			1857...	444...	All
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1860...	116...	All
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1861...	149...	All
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1862...	449...	All
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1864...	582...	All
1865...	234...	All
1865...	246...	All
1865...	307...	All
1865...	691...	All
1865...	780...	All
1866...	73...	All
1866...	259...	All
1866...	322...	All
1866...	371...	All
1866...	697...	All
1866...	780...	All
1866...	799...	All
1866...	838...	All
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1870...	443...	All
1870...	568...	All
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1871...	481...	All
1871...	535...	All
1871...	560...	All
1871...	652...	All
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1871...	669...	All
1871...	697...	All
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1872...	81...	All
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1872...	283...	All
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1872...	374...	All
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1872...	609...	All
1872...	611...	All
1872...	779...	All
1872...	780...	All
1872...	820...	All
1872...	829...	All
1872...	843...	All
1873...	151...	All
1873...	352...	All
1873...	432...	All
1873...	440...	All
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1874...	149...	All	1878...	394...	All
1874...	240...	All	1879...	214...	All
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1875...	108...	All	1879...	393...	All
1875...	113...	All	1879...	395...	All
1875...	119...	All	1879...	413...	All
1875...	120...	All	1879...	415...	All
1875...	159...	All	1879...	441...	All
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1875...	319...	All	1879...	512...	All
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1875...	365...	All	1880...	5...	All
1875...	445...	All	1880...	85...	All
1875...	510...	All	1880...	90...	All
1875...	586...	All	1880...	94...	All
1875...	598...	All	1880...	113...	All
1875...	606...	All	1880...	133...	All
1875...	611...	All	1880...	155...	All
1876...	77...	All	1880...	182...	All
1876...	135...	All	1880...	187...	All
1876...	190...	All	1880...	223...	All
1876...	198...	All	1880...	225...	All
1876...	280...	All	1880...	241...	All
1876...	358...	All	1880...	245...	1, ¶ 3, subd. 5, part relating to receivers ap- pointed as pre- scribed in Code Civil Procedure, § 2429.
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1877...	158...	All	1880...	417...	All
1877...	164...	All	1880...	474...	All
1877...	171...	All	1880...	484...	All
1877...	224...	All	1880...	510...	All
1877...	266...	All	1880...	537...	All
1877...	311...	All	1880...	575...	All
1877...	374...	All	1880...	582...	All
1878...	35...	All	1880...	583...	All
1878...	61...	All	1880...	585...	All
1878...	85...	All			
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1881...	295...	All
1881...	296...	All
1881...	311...	All
1881...	313...	All
1881...	321...	All
1881...	337...	All
1881...	338...	All
1881...	351...	All
1881...	399...	All
1881...	422...	All
1881...	464...	All
1881...	468...	All
1881...	470...	All
1881...	472...	All
1881...	485...	All
1881...	551...	All
1881...	589...	All
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1881...	650...	All
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1882...	290...	All
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1882...	309...	All
1882...	331...	All
1882...	349...	All
1882...	353...	All
1882...	393...	All
1882...	405...	All
1883...	46...	All
1883...	71...	All
1883...	102...	All
1883...	216...	All
1883...	232...	All
1883...	237...	All
1883...	238...	All
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1883...	382...	All
1883...	384...	All
1883...	386...	All
1883...	387...	All
1883...	388...	All
1883...	409...	All
1883...	482...	All
1883...	483...	All
1883...	497...	All
1884...	140...	All
1884...	193...	All
1884...	208...	All
1884...	223...	All
1884...	252...	All
1884...	267...	All
1884...	285...	1
1884...	367...	All
1884...	386...	All
1884...	397...	All
1884...	421...	All
1884...	422...	All
1884...	439...	All
1884...	441...	All
1884...	444...	All
1885...	40...	All
1885...	84...	All
1885...	127...	All
1885...	141...	All
1885...	153...	All
1885...	171...	All
1885...	305...	All
1885...	369...	All
1885...	422...	All
1885...	423...	All
1885...	489...	All
1885...	498...	All
1885...	535...	All
1885...	540...	All
1885...	549...	All
1886...	65...	All
1886...	182...	All
1886...	271...	All
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1886...	551...	All	1890...	543...	All
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1886...	586...	All	1891...	34...	Part relating to appraisal of property of insolvent corporations
1886...	592...	All			
1886...	601...	All	1891...	38...	All
1886...	605...	All	1891...	57...	All
1886...	634...	All	1891...	287...	All
1886...	642...	All	1892...	2...	All
1887...	450...	All	1892...	19...	4
1887...	486...	All	1892...	687...	All except 37
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1887...	570...	All	1894...	400...	All
1887...	601...	All	1895...	672...	All
1887...	616...	All	1896...	139...	All
1887...	622...	All	1896...	282...	All
1887...	724...	All	1896...	932...	1, part adding § 57 to L, 1892, Ch. 688
1888...	189...	All	1898...	522...	Part relating to receivers of corporations
1888...	306...	All			
1888...	313...	All	1898...	534...	All
1888...	359...	All	1899...	201...	All
1888...	394...	All	1900...	177...	All
1888...	447...	All	1900...	704...	All
1888...	462...	All	1900...	733...	All
1888...	513...	All	1900...	760...	All
1888...	514...	All	1901...	96...	All
1888...	549...	All	1901...	214...	All
1888...	560...	All	1901...	355...	All
1889...	57...	All	1901...	506...	All
1889...	76...	All	1901...	538...	All
1889...	78...	All	1902...	9...	All
1889...	236...	All	1902...	60...	All
1889...	242...	All	1902...	285...	All
1889...	281...	All	1903...	178...	All
1889...	332...	All	1904...	236...	All
1889...	369...	All	1904...	296...	All
1889...	426...	All	1904...	490...	All
1889...	519...	All	1904...	705...	All
1889...	524...	All	1904...	737...	All
1889...	531...	All	1904...	754...	All
1889...	532...	All	1905...	256...	All
1889...	564...	All	1906...	228...	All
1890...	23...	All	1906...	239...	All
1890...	98...	All	1906...	349...	All
1890...	119...	All	1906...	531...	All
1890...	193...	All			
1890...	292...	All			
1890...	416...	All			
1890...	421...	All			
1890...	483...	All			
1890...	497...	All			
1890...	505...	All			

Laws of Chapter Section

1907... 115... All

1908... 457... All

Code Civil Procedure.....432,
 subd. 2, from words "by a
 writing" to "an authentica-
 tion;" 716, pt. relating to
 corporations; 1781-1808; 1809,

Laws of Chapter Section

pt. relating to corporations;
 1810, 1811; 1812, 1813, pt.
 relating to corporations;
 2411; 2412-2414, pt. relating
 to corporations; 2415, 2416,
 2419-2431b; 3390-3396, pt. re-
 lating to corporations.

STOCK CORPORATION LAW

Laws of 1909, Chapter 61, Entitled, "An Act Relating to Stock Corporations, Constituting Chapter Fifty-nine of the Consolidated Laws," as Amended to the Commencement of the Legislative Session of 1912. *

CHAPTER 59 OF THE CONSOLIDATED LAWS

Stock Corporation Law

- Article 1. Short title (§ 1).
2. General provisions (§§ 5-18).
3. Directors and officers (§§ 25-35).
4. Stock and stockholders (§§ 50-70).
5. Laws repealed; when to take effect (§§ 80, 81).

ARTICLE 1

Short Title

Section 1. Short title.

§ 1. Short title. This chapter shall be known as the "Stock Corporation Law."

Formerly L. 1890, ch. 564, § 1, part, as am'd by L. 1892, ch. 688.

* The numerous provisions affecting different kinds of stock corporations were, for the first time, grouped and embodied into a single statute, designated as the Stock Corporation Law, by an act passed June 7, 1890, chapter 564, to take effect May 1, 1891. By the Laws of 1892, chapter 688, passed May 18, to take effect immediately, said law was amended and entirely re-enacted, and during subsequent legislative sessions was variously amended until its re-enactment as one of the chapters of the Consolidated Laws in 1909.

ARTICLE 2

† General Provisions

Section 5. Application of article.

6. Power to borrow money and mortgage property.
7. Validating corporate mortgages.
8. Power to guarantee bonds of other corporations.
9. ‡Reorganization upon sale of corporate property.
10. Contents of plan or agreement.
11. Sale of property; possession of receiver and suits against him.
12. Municipalities may assent to plan of readjustment.
13. Change of place of business.
14. Combinations prohibited.
15. Merger.
- 16. Voluntary sale of franchise and property.
17. Rights of non-consenting stockholders on voluntary sale of franchise and property.
18. Alterations or extension of business.

§ 5. Application of article. This article except sections eight, fifteen, sixteen, seventeen and eighteen thereof, shall not apply to moneyed corporations.

Formerly L. 1890, ch. 564, § 1, part, as am'd by L. 1892, ch. 688.

CONSOLIDATORS' NOTE.—The words "except sections 8, 15, 16, 17 and 18 thereof" added by Laws of 1909 for the reason that article 2 does not apply to moneyed corporations, but as sections 8, 15, 16, 17 and 18 are general in scope and substance, applying to moneyed corporations as well as others, and are now placed in article 2 (where they properly belong), they have been excepted from the limitation of the effect of the article in regard to moneyed corporations.

A moneyed corporation is one formed under or subject to the Banking or the Insurance Law. Gen. Corp. Law, § 3, ante.

The Stock Corporation Law does not authorize the formation of corporations thereunder, except by the purchasers of corporate property and franchises, as provided in section 9, post. This law, however, contains the provisions which are specially applicable to all stock corporations; therefore, it applies to all business corporations. For the law pertaining to the formation of business corporations, reference should be had in this volume to the Business Corporations Law.

† CONSOLIDATORS' NOTE.—Title of article changed by Consolidated Laws of 1909 by leaving out words "powers; reorganization," and substituting "provisions." This article, as heretofore amended, did not relate solely to general powers and reorganization, but to other matters, and the proposed title "General Provisions" more accurately describes the matter contained in the article and makes the title uniform with other statutes.

‡ So in the original.

§ 6. Power to borrow money and mortgage property. In addition to the powers conferred by the general corporation law, every stock corporation shall have the power to borrow money and contract debts, when necessary for the transaction of its business, or for the exercise of its corporate rights, privileges or franchises, or for any other lawful purpose of its incorporation; and it may issue and dispose of its obligations for any amount so borrowed, and may mortgage its property and franchises to secure the payment of such obligations, or of any debt contracted for said purposes. Every such mortgage, except purchase-money mortgages and mortgages authorized by contracts made prior to May first, eighteen hundred and ninety-one, shall be consented to by the holders of not less than two-thirds of the capital stock of the corporation, which consent shall be given either in writing or by vote at a special meeting of the stockholders called for that purpose, upon the same notice as that required for the annual meetings of the corporation; and a certificate under the seal of the corporation that such consent was given by the stockholders in writing, or that it was given by vote at a meeting as aforesaid, shall be subscribed and acknowledged by the president or a vice-president and by the secretary or an assistant secretary, of the corporation, and shall be filed and recorded in the office of the clerk or register of the county wherein the corporation has its principal place of business. When authorized by like consent, the directors under such regulations as they may adopt, may confer on the holder of any debt or obligation, whether secured or unsecured, evidenced by bonds of the corporation, the right to convert the principal thereof, after two and not more than twelve years from the date of such bonds, into stock of the corporation; and if the capital stock shall not be sufficient to meet the conversion when made,

the directors shall from time to time, authorize an increase of capital stock sufficient for that purpose by causing to be filed in the office of the secretary of state, and a duplicate thereof in the office of the clerk of the county where the principal place of business of the corporation shall be located, a certificate under the seal of the corporation, subscribed and acknowledged by the president and secretary of the corporation setting forth,

1. A copy of such mortgage; or resolution of directors authorizing the issue of such bonds;

2. That the holders of not less than two-thirds of the capital stock of the corporation duly consented to the execution of such mortgage or resolution of directors authorizing the issue of such bonds by such corporation;

3. A copy of the resolution of the directors of the corporation authorizing the increase of the capital stock of the corporation necessary for the purpose of such conversion;

4. The amount of capital theretofore authorized, the proportion thereof actually issued and the amount of the increased capital stock.

If the corporation be a railroad corporation the certificate shall have indorsed thereon the approval of the public service commission having jurisdiction thereof. When the certificate herein provided for has been filed, the capital stock of such corporation shall be increased to the amount specified in such certificate.

Formerly L. 1890, ch. 564, § 2, as am'd by L. 1892, chs. 337, 688; L. 1901, ch. 354; L. 1905, ch. 745.

Scope of Section.

This section relates to all stock corporations, except banking and insurance corporations (see § 5 of this law) and railroad corporations (see the Railroad Law, § 4, subd. 10).

Amendments of 1901.

By the terms of this section, as amended in 1901, the consent to mortgage may be given by holders of at least two-thirds of the capital stock, either in writing or by vote, cast in person or by proxy (see Gen. Corp. Law, § 26) at a special meeting called

for that purpose, upon the same notice as that required for annual meetings. In either event a certificate under the corporate seal must be executed setting forth that such consent was given by the stockholders in writing, or by vote at such special meeting, which certificate is to be signed by the president or a vice-president and by the secretary or an assistant secretary of the corporation and filed and recorded in the office of the clerk or register of the county where the principal place of business is located.

Removal of Debt Limit.

The amendment of 1901 enlarged the power to borrow money secured by mortgage, the maximum limitation upon the mortgage indebtedness having been stricken out, enabling the corporation to incur mortgage indebtedness for lawful purposes to any extent that its credit and security will permit, without reference to capitalization.

Heretofore provisions which were essentially a continuation of the former limitations of this section were contained in former section 24 of this law, which prescribed as a penalty upon directors voting for an overissue of bonds personal liability to the holders of the bonds illegally issued for the amount held by them, and to all persons sustaining damage by such illegal issues for any damages caused thereby, but said section 24 was repealed by L. 1901, ch. 354, so as to leave nothing in conflict with the liberalized features of the foregoing section.

In connection with the above section, see, also, the next succeeding section (added by L. 1901, ch. 354), which provides that when a mortgage recites that it has been duly authorized by holders of the requisite amount of stock, such recital shall be presumptive evidence that the law has been complied with, and if the mortgage has been recorded for one year and interest has been paid thereon, it becomes valid, even though irregular in its execution. This provision prevents the security of underlying corporate bonds being invalidated, and thereby protects the purchasers.

Stockholders' Consent.

The proviso, in respect to the assent of shareholders, is for their protection. *Greenpoint Sugar Co. v. Whittin*, 69 N. Y. 328; *Rochester Sav. Bk. v. Averell*, 26 Hun 643; *Lord v. Yonkers Fuel Gas Co.*, 99 N. Y. 547; *Hamilton Trust Co. v. Clemes*, 17 App. Div. 152, *affd.*, 163 N. Y. 423; *Black v. Ellis*, 129 App. Div. 140. The statement of *Hardin, J.*, in *Rochester Sav. Bk. v. Averell*, *supra*, p. 646, that it is also for the protection of bona fide creditors, is not supported by the authorities cited by him, and does not appear to be the law. *Market & Fulton Nat. Bk. v. Jones*, 7 Misc. 277, *affd.*, 90 Hun 605.

Stock owned by the corporation cannot be included to make up the requisite two-thirds. *Vail v. Hamilton*, 85 N. Y. 453. But an assent by two-thirds of the issued stock is sufficient. *Id.*; *Lyceum v. Ellis*, 30 St. Rep. 242; *Greenpoint Sugar Co. v. Whittin*, 69 N. Y. 328; 20 Hun, 355; *Swan v. Stiles*, 94 App. Div. 117.

A mortgage executed without assent is validated by subsequent assent if there are no intervening rights. *Rochester Sav. Bk. v. Averell*, 96 N. Y. 467; *Martin v. Niag. F. Paper Co.*, 122 N. Y. 165; *Greenpoint S. Co. v. Whitin*, 69 N. Y. 328.

Filing Consent.

In order to validate a corporation mortgage it is essential not only that stockholders owning two-thirds of the stock should give their consent, but also that such consent should be filed in the proper clerk's office. *Matter of Wendler Mach. Co.*, 2 App. Div. 16.

The assent and mortgage may be filed and recorded simultaneously. *Roch. Sav. Bk. v. Averell*, 96 N. Y. 467; *Everson v. Eddy*, 36 St. Rep. 764; *Welch v. Imp. & T. Nat. Bk.*, 122 N. Y. 177.

The provision requiring filing is merely to perpetuate evidence. If the consent has actually been given, the fact that it was not filed will not invalidate the mortgage. *Black v. Ellis*, 129 App. Div. 140.

Officers, Duties and Liabilities.

Where two individuals sign a promissory note, and after their respective names write "President" and "Treasurer," it is their individual obligation and not a corporate obligation if there is nothing in the body of the note to indicate that it is a corporate obligation, even though the name of the corporation be printed on the margin. *First Nat. Bk. of Bklyn. v. Wallis*, 150 N. Y. 455, affg. *Same v. Same*, 84 Hun 376, and *Same v. Stuetzer*, 80 Hun 435; *Casco Nat. Bk. v. Clark*, 139 N. Y. 307; *Merchants' Nat. Bk. v. Clark*, 139 N. Y. 314. As between the original parties and those having notice, however, the consideration and the conditions under which the note was given may be shown. *Megowan v. Peterson*, 173 N. Y. 1; *First Nat. Bk. v. Wallis*, supra, distgd.

Where an officer who practically owns the corporation, and has power to raise money upon its negotiable bonds, receives a loan upon them, the advances thus made, although further secured by the individual note of the officer, will be deemed to have been made to the corporation and not to the individual. *Buffalo Loan, T. & S. D. Co. v. Medina Gas & Elec. Lt. Co.*, 12 App. Div. 199; affd., 162 N. Y. 67.

An officer may own mortgage bonds, but he cannot buy them directly from the corporation below par, except at the peril of avoidance by the court. *Coman v. Lackey*, 80 N. Y. 345; 88 N. Y. 1; *Harpending v. Munson*, 91 N. Y. 650.

Purchase Money Mortgages.

Independent of the statute on principles of equity a mortgage to secure the purchase price of property may be executed by a corporation without the consent of its stockholders. *Coman v. Lackey*, 80 N. Y. 345; *Farmers' Loan & Trust Co. v. Equity Gas Light Co.*, 84 Hun 373; *In re Beaver Knitting Mills*, 154 Fed. 320.

Estoppel to Deny Validity of Mortgage.

Since its enactment by L. 1901, ch. 354, the provisions of Stock Corp. Law, § 7, affect certain irregularities in recorded corporate mortgages.

A corporation and its creditors are estopped as against the mortgagee, so long as it holds the benefit of property acquired under a mortgage, from raising the objection that the necessary consents of stockholders were not given. *Hamilton Trust Co. v. Clemes*, 17 App. Div. 152, *affd.*, 163 N. Y. 423.

A creditor who assented to the execution of a corporate mortgage and remained silent until after it was foreclosed and rights of third parties have intervened, is estopped from attacking the validity of such mortgage. *New Britain Nat. Bk. v. A. B. Cleveland Co.*, 91 Hun 447.

Usury not a Defense.

Corporations are prohibited from interposing the defense of usury by the General Business Law (L. 1909, ch. 25), section 374, which is a re-enactment of L. 1850, ch. 172, and reads as follows:

§ 374. Corporations prohibited from interposing defense of usury.—No corporation shall hereafter interpose the defense of usury in any action. The term corporation, as used in this section, shall be construed to include all associations, and joint-stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships. Gen. Bus. Law, § 374.

The prohibition against setting up the defense of usury applies to foreign as well as domestic corporations. *Southern Life Ins. Co. v. Packer*, 17 N. Y. 52.

Neither the corporation maker of a note nor its indorsers can plead usury as a defense to the note. *Ludington v. Kirk*, 17 Misc. 129.

Days of Grace Abolished.

The act of 1894, ch. 607, abolishing days of grace, was repealed and superseded by the Negotiable Instruments Law, ch. 612, L. 1897 (now L. 1909, ch. 43), section 145 of which reads as follows:

§ 145. Time of maturity.—Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due or becoming payable on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.

§ 7. Validating corporate mortgages. Whenever any mortgage affecting property or franchises within this state heretofore or hereafter executed by authority of

the board of directors in behalf of any stock corporation, domestic or foreign, of any description, recites or represents in substance or effect that the execution of such mortgage has been duly consented to, or authorized by stockholders, such recital or representation in any such mortgage, after public record thereof within this state, shall be presumptive evidence that the execution of such mortgage has been duly and sufficiently consented to, and authorized by stockholders as required by any provision of law. After any such mortgage heretofore or hereafter shall have been publicly recorded for more than one year in one or more of the counties of this state containing the mortgaged premises or any part thereof, and the corporation shall have received value for bonds actually issued under and secured by such mortgage, and interest shall have been paid on any of such bonds according to the terms thereof, such recital or representation of such mortgage so recorded shall be conclusive evidence that the execution of such mortgage has been duly and sufficiently consented to, and authorized by stockholders as required by any provision of law, and its validity shall not be impaired by reason of any defect or insufficiency of consent or authority of stockholders or in filing or recording such consent or authority, and such mortgage shall be valid and binding upon the corporation, and those claiming under it, as security for all valid bonds issued or to be issued thereunder, unless such mortgage shall be adjudged invalid in an action begun as hereinafter, in this section, provided. Notwithstanding the foregoing provisions of this section, the invalidity of any such mortgage heretofore recorded because of insufficiency of consent by stockholders may be adjudged in any action for such purpose begun before the first day of April, nineteen hundred and two, and the invalidity of any such mortgage hereafter recorded,

because of insufficiency of consent by stockholders, may be adjudged in any action for such purpose begun, within one year after the earliest record of such mortgage in any county in this state, provided in either case that such action shall have been so begun by or in behalf of the corporation by direction of the board of directors acting in their own discretion, or upon the written request of the holders of not less than one-third of the capital stock of the corporation; and in any such action so begun by or in behalf of the corporation, the recitals or representations of the mortgage shall be presumptive evidence only as first above provided. Whenever hereafter, in compliance with any law of this state, the officers of any corporation shall have made and filed and recorded a certificate that the execution of a mortgage hereafter made by the corporation has been duly consented to by stockholders, such certificate shall be conclusive evidence as to the truth thereof, in favor of any and all persons who in good faith shall receive or purchase, for value, any bond or obligation purporting to be secured by such mortgage, at any time when said certificates shall remain of record and uncanceled. Nothing in this section contained shall affect any right or any remedy in respect of any such right of any creditor accrued before this enactment nor shall it dispense with the necessity of obtaining the consent of the public service commission having jurisdiction thereof to any mortgage by a railroad corporation.

Formerly § 8, being the new provisions added by L. 1901, ch. 354.

CONSOLIDATORS' NOTE.—This section was formerly section 8. It contained no heading and so the heading "Validating corporate mortgages" has been added. It was made section 7 so that it would follow the other matter relating to corporate mortgages contained in section 6, in order to have all matter relating to the same subject-matter as closely together as possible. The advantage of such transpositions is readily seen, and wherever the same thing could be accomplished in other portions of the statute, it has been done.

The foregoing section applies to both foreign and domestic corporations. For other provisions in relation to foreign corporations, see the index.

§ 8. Power to guarantee bonds of other corporations. Any stock corporation may, in pursuance of a unanimous vote of its stockholders voting at a special meeting called for that purpose by notice in writing signed by a majority of the directors of such corporation stating the time and place and object of the meeting and served upon each stockholder appearing as such upon the books of the corporation, personally or by mail at his last-known post-office address at least sixty days prior to such meeting, guarantee the bonds of any other domestic corporation engaged in the same general line of business; and any stock corporation owning the entire capital stock of any other domestic stock corporation engaged in the same general line of business may in pursuance of a two-thirds vote of its stockholders voting at a special meeting called for that purpose by notice in writing signed by a majority of the directors of such corporation, stating the time and place and object of the meeting and served upon each stockholder appearing as such upon the books of the corporation personally, or by mail, at his last-known post-office address, at least sixty days prior to such meeting, guarantee the bonds of such other corporation.

Formerly L. 1890, ch. 564, part of § 40, as am'd by L. 1892, ch. 688; L. 1902, ch. 601.

CONSOLIDATORS' NOTE.—Portion of former section 40 has been transferred to article 2 because it is a general provision regulating the powers of stock corporations.

The last clause, permitting a corporation owning the entire capital stock of another corporation to guarantee the bonds of the latter pursuant to a two-thirds vote of the stockholders, was added by L. 1902, ch. 601.

No statute of this State makes it illegal for a foreign corporation to guarantee the payment of bonds of another corporation. *Dougan v. Evansville & T. H. R. R. Co.*, 15 App. Div. 483, 44 Supp. 503.

§ 9. Reorganization upon sale of corporate property and franchises. When the property and franchises of any domestic stock corporation shall be sold by virtue of a mortgage or deed of trust, duly executed by it, or pursuant to the judgment or decree of a court of competent jurisdiction, or by virtue of any execution issued thereon, and the purchaser, his assignee or grantee shall have acquired title to the same in the manner prescribed by law, he may associate with him any number of persons, not less than the number required by law for an incorporation for similar purposes at least two-thirds of whom shall be citizens of the United States and one shall be a resident of this state, and they may become a corporation and take and possess the property and franchises thus sold, and which were at the time of the sale possessed by the corporation whose property shall have been so sold, upon making and acknowledging and filing in the offices where certificates of incorporation are required by law to be filed, a certificate in which they shall describe by name and reference to the law under which it was organized, the corporation whose property and franchises they have acquired, and the court by whose authority the sale had been made, with the date of the judgment or decree authorizing or directing the same, and a brief description of the property sold, and also the following particulars:

1. The name of the new corporation intended to be formed by the filing of such certificate; and the place where its principal office is to be located.

2. The maximum amount of its capital stock and the number of shares into which it is to be divided, specifying the classes thereof, whether common or preferred, and the amount of and rights pertaining to each class.

3. The number of directors, not less nor more than the number required by law for the old corporation, who

shall manage the affairs of the new corporation, and the names and post-office addresses of the directors for the first year. They may insert in such certificate any provisions relating to the new corporation, or its management, contained in any plan or agreement which may have been entered into as provided in section ten of this chapter. Such corporation shall be vested with, and be entitled to exercise and enjoy, all the rights, privileges and franchises, which at the time of such sale belonged to, or were vested in the corporation last owning the property sold, or its receiver, and shall be subject to all the provisions, duties and liabilities imposed by law on that corporation. Any proceedings heretofore taken in substantial compliance with this section as hereby amended, and any and all incorporations based thereon are hereby ratified and confirmed.

Formerly L. 1890, ch. 564, § 3, as am'd by L. 1892, ch. 688; L. 1901, ch. 354; L. 1902, ch. 80; L. 1904, ch. 706.

Scope of Section.

This right of reorganization was formerly conferred only upon railroad corporations under L. 1873, ch. 469; L. 1874, ch. 430, and L. 1876, ch. 446, each of which is now repealed and superseded by the above and the three immediately succeeding sections, by the terms of which the right is extended to all domestic stock corporations, except banks and insurance corporations, the latter being excluded by section 5 of this law.

Amendments of 1901 and 1902.

By L. 1901, ch. 354, the provision that a majority of the persons reorganizing the corporation must be citizens of the United States and residents of the State of New York, was modified so as to provide that at least two-thirds must be citizens of the United States and at least one a resident of the State, thus conforming these qualifications to those prescribed in regard to incorporation of companies *de novo*.

The words, "his assignee or grantee" in the seventh line, were inserted by the amendment of 1902, and the last sentence was also added, ratifying and confirming incorporations theretofore based on proceedings under this section.

Filing and Recording Certificate.

The certificate above provided for must be filed and recorded in the office of the Secretary of State, and a duplicate original,

or a copy certified by the Secretary of State, must also be filed and recorded in the office of the clerk of the county in which the office of the new corporation is to be located. Gen. Corp. Law, § 5.

Organization Tax.

The tax of one-twentieth of one per cent. for the privilege of organization must be paid by the reorganized corporation, as it is a new corporation within the meaning of the Organization Tax Law. *Peo. ex rel. Schurz v. Cook*, 110 N. Y. 443, *affd.*, 148 U. S. 397; *Peo. ex rel. Mertens v. Cook*, *id. affd.*, 154 U. S. 512.

Reorganization and Reincorporation.

Any number of persons may purchase the property for themselves and organize a new corporation, which will possess all the powers, rights, privileges and franchises of the prior corporation. *Vatable v. N. Y., L. E. & W. R. R. Co.*, 96 N. Y. 49. See, also, *Pratt v. Munson*, 84 N. Y. 582; *Thornton v. Wabash Ry. Co.*, 81 N. Y. 462.

The right to be a corporation, which the old corporation had, was not mortgaged or sold, and so did not pass to the purchasers. They obtain such right upon filing the certificate mentioned, and then only by direct grant from the State. *Peo. ex rel. Schurz v. Cook*, *supra*. See, also, *Metz v. Buffalo, Corry & Pittsb. R. R. Co.*, 58 N. Y. 61.

Rights of Stockholders.

The rights of each stockholder of the prior corporation will be cut off by foreclosure and sale. The only property interest left to him is in the surplus, if any, after satisfying the mortgage and other preferential claims. *Vatable v. N. Y., L. E. & W. R. R. Co.*, 96 N. Y. 56. If, however, the purchasers buy in pursuance of a plan for adjustment of the respective interests of the mortgage creditors and stockholders, then such plan must be embodied in the certificate to be filed. *Id.* In such case the statute secures to a stockholder the option to join the new company by compliance with the terms of the plan. *Id.*

§ 10. **Contents of plan or agreement.** At or previous to the sale the purchasers thereat, or the persons for whom the purchase is to be made, may enter into a plan or agreement, for or in anticipation of the readjustment of the respective interests therein of any creditors, mortgagees and stockholders, or any of them, of the corporation owning such property and franchises at the time of sale, and of holders of claims for materials, supplies and equipment furnished, and for injuries and damages sustained, in and about the operation, maintenance or

construction of any or all the property formerly owned or leased to said corporation, and for the representation of such interests in the bonds or stock of the new corporation to be formed, and may therein regulate voting by the holders of the preferred and common stock at any meeting of the stockholders, and may provide for, and regulate voting by the holders, and owners of any or all of the bonds of the corporation, foreclosed, or of the bonds issued or to be issued by the new corporation; and such right of voting by bondholders shall be exercised in such manner, for such period, and upon such conditions, as shall be therein described. Such plan or agreement must not be inconsistent with the laws of the state and shall be binding upon the corporation, until changed as therein provided, or as otherwise provided by law. The new corporation when duly organized, pursuant to such plan or agreement and to the provisions of law, may issue its bonds and stock in conformity with the provisions of such plan or agreement, and may at any time within six months after its organization, compromise, settle or assume the payment of any debt, claim or liability of the former corporation or any claims for materials, supplies and equipment furnished, or any claims for injuries and damages sustained, in and about the operation, maintenance or construction of any or all the property formerly owned or leased to said corporation, upon such terms as may be lawfully approved by a majority of the agents or trustees intrusted with the carrying out of the plan or agreement of reorganization, and may establish preferences in favor of any portion of its capital stock and may divide its stock into classes; but the capital stock of the new corporation shall not exceed in the aggregate the maximum amount of stock mentioned in the certificate of incorporation.

Formerly L. 1890, ch. 564, § 4, as re-enacted by L. 1892, ch. 688, and am'd by L. 1901, ch. 354.

Thus am'd by L. 1911, ch. 858.

AMENDMENT OF 1901.—The only change, except in phraseology, made in this section by the amendment of 1901, was the striking out of the maximum limitation as to the amount of bonded indebtedness permitted, so as to harmonize the section with the provisions of section 6, ante.

When the plan for readjustment of interest has been embodied in the certificate filed for the organization of the new corporation it constitutes notice to stockholders of its general features. *Vatable v. N. Y., L. E., etc., Co.*, 96 N. Y. 59.

§ 11. Sale of property; possession of receiver and suits against him. The supreme court may direct a sale of the whole of the property, rights and franchises covered by the mortgage or mortgages, or deeds of trust foreclosed at any one time and place to be named in the judgment or order, either in case of the non-payment of interest only, or of both the principal and interest due and unpaid and secured by any such mortgage or mortgages or deeds of trust. Neither the sale nor the formation of the new corporation shall interfere with the authority or possession of any receiver of such property and franchises, but he shall remain liable to be removed or discharged at such time as the court may deem proper. No suit or proceeding shall be commenced against such receiver unless founded on wilful misconduct or fraud in his trust after the expiration of sixty days from the time of his discharge; but after the expiration of sixty days the new corporation shall be liable in any action that may be commenced against it, and founded on any act or omission of such receiver for which he may not be sued, and to the same extent as the receiver, but for this section would be or remain liable, or to the same extent that the new corporation would be had it done or omitted the acts complained of.

Formerly L. 1890, ch. 564, as re-enacted by L. 1892, ch. 688.

§ 12. Municipalities may assent to plan of readjustment. The commissioners, corporate authorities or proper officers of any city, town or village, who may

hold stock in any corporation, the property and franchises whereof shall be liable to be sold, may assent to any plan or agreement of reorganization which lawfully provides for the formation of a new corporation, and the issue of stock therein to the proper authorities or officers of such cities, towns or villages in exchange for the stock of the old or former corporation by them respectively held. And such commissioners, corporate authorities or other proper officers may assign, transfer or surrender the stock so held by them in the manner required by such plan, and accept in lieu thereof the stock issued by such new corporation in conformity therewith.

Formerly L. 1890, ch. 564, § 6, as am'd by L. 1892, ch. 688; L. 1901, ch. 354.

The amendment of 1901 changed the foregoing section by striking out a clause which read as follows: "Every stockholder in any corporation, the franchises and property whereof shall have been thus sold, may assent to the plan of readjustment and reorganization of interests pursuant to which such franchises and property shall have been purchased at any time within six months after the organization of the new corporation, and by complying with the terms and conditions of such plan become entitled to his pro rata benefits therein."

§ 13. Change of place of business. Any stock corporation now existing or hereafter organized under the laws of this state, except moneyed corporations, may at any time change its principal office and place of business from the city, town or county named in its certificate of incorporation, or to which it may have been changed under the provisions of this section, to any other city, town or county in this state, in which it may desire to actually transact and carry on its regular business from day to day, provided that such change has been authorized, either by unanimous consent of the stockholders expressed in writing and duly acknowledged and filed in the office of the secretary of state, or by a vote of the stockholders of said corporation at a special meeting of stockholders called for that purpose. When such change

shall be authorized by the stockholders as herein provided, the president and secretary and a majority of the directors of such corporation shall sign a certificate stating the name of said corporation, the city, town and county where its principal office and place of business was originally located, and to which it may have been subsequently changed, and the city, town and county to which it is desired to change its said principal office and place of business, and that it is the purpose of said corporation to actually transact and carry on its regular business from day to day at such place, and that such change has been authorized as herein provided, and the names of the directors of said corporation and their respective places of residence, which certificate shall be verified by the oaths of all the persons signing the same, and when so signed and verified, shall be filed in the office of the secretary of state and a duplicate thereof in the office of the clerk of the county from which said principal office and place of business is about to be removed or changed, and another in the office of the clerk of the county to which said removal or change is to be made, and thereupon the principal office and place of business of such corporation shall be changed as stated in said certificate.

Formerly § 50, as added by L. 1896, ch. 929, and am'd by L. 1905, ch. 489.

CONSOLIDATORS' NOTE.—Former § 59 has been transferred as above to article 2, where it properly belongs, because relating to general powers.

The provision permitting a change of place of business by unanimous consent was added by L. 1905, ch. 489.

§ 14. Combinations prohibited. No domestic stock corporation and no foreign corporation doing business in this state shall combine with any other corporation or person for the creation of a monopoly or the unlawful restraint of trade or for the prevention of competition in any necessary of life.

Formerly L. 1890, ch. 564, § 7, as am'd by L. 1892, ch. 688; L. 1897, ch. 384.

CONSOLIDATORS' NOTE.—Attention is here called to the fact that section 14 (former section 7), prohibiting monopolies and unlawful combinations does not apply to moneyed corporations, i. e., banks, trust companies, insurance companies, etc., as the law now stands, but no good reason is apparent why that class of corporations should be excepted from the general prohibition.

By the amendment of 1897 the scope of this section was extended so as to include foreign corporations doing business in this State. For reference to other provisions affecting such corporations, see the index under the heading "Foreign Corporations."

Corporations cannot enter into a combination similar to a partnership, massing stock, and sharing profits and losses, without express authority by charter. *People v. North River Sugar Ref'g Co.*, 121 N. Y. 582, 3 N. Y. Supp. 401; *Mallory v. Hanaur Oil Works*, 86 Tenn. 598.

Not all combinations in trade are condemned. Self-preservation may justify the prevention of undue and ruinous competition when the prevention is sought by fair and legal methods. *U. S. Vinegar Co. v. Foehrenbach*, 148 N. Y. 58, discussing 143 N. Y. 537, affg. 74 Hun 435; *Rafferty v. Buf. Gas Co.*, 37 App. Div. 618.

It is not against public policy for two corporations engaged in the same general line of business to consolidate. *Cameron v. N. Y. & Mt. V. Water Co.*, 62 Hun 269, affd. on other grounds, 133 N. Y. 336; *Holmes & Griggs Mfg. Co. v. Holmes & W. M. Co.*, 127 N. Y. 252.

An agreement by which a person promises that he will not directly or indirectly engage in, or become associated with, any business of a similar character to that of the other party, either as principal, agent, employee, or in any other relation or capacity, or as stockholder, director, trustee, agent, officer or employee of any corporation, other than one specified, in any State or Territory of the United States, except the State of Washington is not illegal as in general restraint of trade. *Nat. Wall Paper Co. v. Hobbs*, 90 Hun 288, citing *Diamond Match Co. v. Roeber*, 106 N. Y. 473.

Donnelly Act to Prevent Monopolies.

Another law to prevent monopolies was enacted by L. 1893, ch. 716, and amended by L. 1896, ch. 267; but said act was superseded by L. 1897, ch. 383. The latter act was repealed and superseded by L. 1899, ch. 690, and this statute was repealed by the General Business Law of 1909, ch. 25 (Consolidated Laws, ch. 20), article 22, sections 340-346 of which now contain identical provisions, as follows:

§ 340. **Contracts for monopoly illegal and void.** Every contract, agreement, arrangement or combination whereby a monopoly in the manufacture, production or sale in this State of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this State

in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this State of the manufacture, production or sale of any such article or commodity, the free pursuit in this State of any lawful business, trade or occupation is or may be restricted or prevented, is hereby declared to be against public policy, illegal and void.

§ 341. Penalty. Every person or corporation, or any officer or agent thereof, who shall make or attempt to make or enter into any such contract, agreement, arrangement or combination, or who within this state shall do any act pursuant thereto, or in, toward or for the consummation thereof, wherever the same may have been made, is guilty of a misdemeanor, and on conviction thereof shall, if a natural person, be punished by a fine not exceeding five thousand dollars, or by imprisonment for not longer than one year, or by both such fine and imprisonment; and if a corporation, by a fine of not exceeding twenty thousand dollars. An indictment based on a violation of any of the provisions of this section must be found within two years after its commission.

Thus am'd by L. 1910, ch. 633.

§ 342. Action to restrain and prevent. The attorney-general may bring an action in the name and in behalf of the people of the State against any person, trustee, director, manager or other officer or agent of a corporation, or against a corporation, foreign or domestic, to restrain and prevent the doing in this State of any act herein declared to be illegal, or any act in, toward or for the making or consummation of any contract, agreement, arrangement or combination herein prohibited, wherever the same may have been made.

§ 343. Procedure; application for order. Whenever the attorney-general has determined to commence an action or proceeding under this article, he may present to any justice of the supreme court, before beginning such action or proceeding, an application in writing, for an order directing the persons mentioned in the application to appear before a justice of the supreme court, or a referee designated in such order, and answer such questions as may be put to them or to any of them, and produce such papers, documents and books concerning any alleged illegal contract, arrangement, agreement or combination in violation of this article; and it shall be the duty of the justice of the supreme court, to whom such application for the order is made, to grant such application. The application for such order made by the attorney-general may simply show upon his information and belief that the testimony of such person is material and necessary. The provisions of the code of civil procedure, chapter nine, title three, article one, relating to the application for an order for the examination of witnesses before the commencement of an action and the method

of proceeding on such examinations, shall not apply except as herein prescribed. The order shall be granted by the justice of the supreme court to whom the application has been made, with such preliminary injunction or stay as may appear to such justice to be proper and expedient, and shall specify the time when and place where the witnesses are required to appear, and such examination shall be held either in the city of Albany, or in the judicial district in which the witness resides, or in which the principal office within this State, of the corporation affected, is located. The justice or referee may adjourn such examination from time to time and witnesses must attend accordingly. The testimony of each witness must be subscribed by him, and all must be filed in the office of the clerk of the county in which such order for examination is filed.

§ 344. Order for examination. The order for such examination must be signed by the justice making it, and the service of a copy thereof, with an indorsement by the attorney-general, signed by him, to the effect that the person named therein is required to appear and be examined at the time and place, and before the justice or referee specified in such indorsement, shall be sufficient notice for the attendance of witnesses. Such indorsement may contain a clause requiring such person to produce on such examination all books, papers and documents in his possession, or under his control, relating to the subject of such examination. The order shall be served upon the person named in the indorsement aforesaid, by showing him the original order, and delivering to and leaving with him, at the same time, a copy thereof indorsed as above provided, and by paying or tendering to him the fee allowed by law to witnesses subpoenaed to attend trials of civil actions in a court of record in this State.

§ 345. No person excused from answering. No person shall be excused from attending and testifying, or from producing any books, papers or other documents before any court, magistrate or referee, upon any investigation, proceeding or trial, pursuant to or for a violation of any of the provisions of this article, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture, for or on account of any transaction, matter or thing concerning which he may so testify, or produce evidence, documentary or otherwise. And no testimony so given or produced shall be received against him upon any criminal investigation, proceeding or trial.

Thus am'd by L. 1910, ch. 394.

§ 346. Powers of referee. A referee appointed as provided in this article possesses all the powers and is subject to all the duties of a referee appointed under section ten hundred and

eighteen of the code of civil procedure, so far as practicable, and may punish for contempt a witness duly served as prescribed in this article for non-attendance or refusal to be sworn or to testify or to produce books, papers and documents according to the direction of the indorsement aforesaid, in the same manner, and to the same extent as a referee appointed to hear, try and determine an issue of fact or of law.

The foregoing act is popular known as the "Donnelly Anti-Trust Law." It applies to both foreign and domestic corporations. For other provisions in relation to foreign corporations, see the index.

§ 15. Merger. Any domestic stock corporation and any foreign stock corporation authorized to do business in this state lawfully owning all the stock of any other stock corporation organized for, or engaged in business similar or incidental to that of the possessor corporation may file in the office of the secretary of state, under its common seal, a certificate of such ownership, and of the resolution of its board of directors to merge such other corporation, and thereupon it shall acquire and become, and be possessed of all the estate, property, rights, privileges and franchises of such other corporation, and they shall vest in and be held and enjoyed by it as fully and entirely and without change or diminution as the same were before held and enjoyed by such other corporation, and be managed and controlled by the board of directors of such possessor corporation, and in its name, but without prejudice to any liabilities of such other corporation or the rights of any creditors thereof. Any bridge corporation may be merged under this section with any railroad corporation which shall have acquired the right by contract to run its cars over the bridge of such bridge corporation.

Formerly § 58, as added by L. 1896, ch. 932, and am'd by L. 1900, ch. 476; L. 1902, ch. 98.

CONSOLIDATORS' NOTE.—This section has been placed in article 2, because it is a general provision. The heading is new.

Prior to the amendment of 1902 the provisions of this section applied only to domestic corporations.

In view of the provisions of Gen. Corp. Law, § 5 the certifi-

cate must be filed and recorded in the office of the county clerk as well as in the office of the Secretary of State.

§ 16. **Voluntary sale of franchise and property.** A stock corporation, except a railroad corporation and except as otherwise provided by law, with the consent of two-thirds of its stock, may sell and convey its property, rights, privileges and franchises, or any interest therein or any part thereof to a domestic corporation, engaged in a business of the same general character, or which might be included in the certificate of incorporation of a corporation organizing under any general law of this state for a business of the same general character, and a domestic corporation the principal business of which is carried on in, and the principal tangible property of which is located within a state adjoining the state of New York, may with the consent of the holders of ninety-five per centum of its capital stock, sell and convey its property situate without the state of New York, not including its franchises, to a corporation organized under the laws of such adjoining state, and such sale and conveyance shall, in case of a sale to a domestic corporation, vest the rights, property and franchises thereby transferred, and in case of a sale to a foreign corporation the property sold, in the corporation to which they are conveyed for the term of its corporate existence, subject to the provisions and restrictions applicable to the corporation conveying them. Before such sale or conveyance shall be made such consent shall be obtained at a meeting of the stockholders called upon like notice as that required for an annual meeting.

Part of former § 33, added by L. 1893, ch. 638, as am'd by L. 1901, ch. 130.

CONSOLIDATORS' NOTE.—Former section 33 has been transferred to article 2, section 16, as it is a general provision. It has been divided into two sections so that its provisions will stand out plainly. The word "voluntary" has been added to the heading to distinguish it from sale under mortgage or judgment provided for by section 11.

The amendment of 1901 added the provision permitting a domestic corporation owning property in an adjoining State to sell such property to a corporation organized in such adjoining State. This new feature was undoubtedly inserted to meet a special case.

A provision in a certificate of incorporation that the directors may, with the consent of the holders of two-thirds of the capital stock sell, assign, transfer or otherwise dispose of the whole property of the corporation, not including franchises, to any person or corporation, domestic or foreign, is contrary to this section, which governs the power of a corporation to sell its property, for the section provides that the transfer of an entire property requires the consent of 95 per centum if made to a foreign corporation, and transfer to domestic corporations can only be made if the transferee is engaged in a business of the same general character. *Peo. ex rel. Barney v. Whalen*, 119 App. Div. 749, *affd.*, 189 N. Y. 560; *Same v. Same*, 56 Misc. 278.

The title to the corporate property is in the fictitious entity called the corporation and if all the stock were owned by one person he could not by his conveyance affect the legal title; its officers and agents only have authority to act for it. *Buffalo Loan, Trust & Safe Deposit Co. v. Medina Gas & Elec. Lt. Co.*, 162 N. Y. 67, *affg.* 12 App. Div. 199; *Palmer v. Ring*, 113 App. Div. 643; *Saranac & Lake Placid R. R. Co. v. Arnold*, 167 N. Y. 368, *revsg.* 41 App. Div. 482.

§ 17. Rights of non-consenting stockholders on voluntary sale of franchise and property. If any stockholder not voting in favor of such proposed sale or conveyance shall at such meeting, or within twenty days thereafter, object to such sale, and demand payment for his stock, he may, within sixty days after such meeting, apply to the supreme court at any special term thereof held in the district in which the principal place of business of such corporation is situated, upon eight days' notice to the corporation, for the appointment of three persons to appraise the value of such stock, and the court shall appoint three such appraisers, and designate the time and place of their proceedings as shall be deemed proper, and also direct the manner in which payment for such stock shall be made to such stockholders. The court may fill any vacancy in the board of appraisers occurring by refusal or neglect to serve or otherwise. The appraisers shall meet at the time and place designated, and they or

any two of them, after being duly sworn honestly and faithfully to discharge their duties, shall estimate and certify the value of such stock at the time of such dissent, and deliver one copy to such corporation, and another to such stockholder, if demanded; the charges and expenses of the appraisers shall be paid by the corporation. When the corporation shall have paid the amount of such appraisal, as directed by the court, such stockholders shall cease to have any interest in such stock and in the corporate property of such corporation and such stock may be held or disposed of by such corporation.

Part of former § 33, added by L. 1893, ch. 638, as am'd by L. 1901, ch. 130.

CONSOLIDATORS' NOTE.—This section is part of former § 33, made into a new section without change, except heading is added, as explained in last note.

§ 18. Alterations or extension of business. Any stock corporation heretofore or hereafter organized under any general or special law of this state may alter its certificate of incorporation so as to include therein any purposes, powers or provisions which at the time of such alteration may apply to corporations engaged in a business of the same general character, or which might be included in the certificate of incorporation of a corporation organized under any general law of this state for a business of the same general character, by filing in the manner provided for the original certificate of incorporation an amended certificate, executed by the president and secretary, stating the alteration proposed, and that the same has been duly authorized by a vote of a majority of the directors and also by vote of stockholders representing at least three-fifths of the capital stock, at a meeting of the stockholders called for the purpose in the manner provided in section sixty-three of this chapter, and a copy of the proceedings of such meeting, veri-

fied by the affidavit of one of the directors present thereat, shall be filed with such amended certificate.

Formerly § 32, added by L. 1892, ch. 688, as am'd by L. 1901, ch. 354; L. 1905, ch. 751.

CONSOLIDATORS' NOTE.—Former § 32 has been transferred to article 2, as above, because it is a general provision.

Prior to the amendment of the above section in 1901 it authorized a corporation only to "extend or alter its business and powers," although the Gen. Corp. L. provides for inserting in the certificate of incorporation various matters in addition to the specification of the business and powers of the corporation, and there are various provisions of law authorizing the filing of amended or supplemental certificates specifying other matters than those provided for by this section. Therefore, the section, as amended in 1901, now provides that a corporation, by filing an amended or supplemental certificate, may alter its certificate of incorporation so as to include therein any purposes, powers or provisions which at the time of such alteration may apply to corporations engaged in business of the same general character or which might be included in the certificate of incorporation of a corporation organized under any general law for a business of the same general character.

Article 2 of the Stock Corporation Law terminates with section 18, *supra*, and the next article (3) begins with section 25. The corporation laws were enacted in this manner with intervals between the articles in the numerical order of sectioning, instead of maintaining a continuity of section numbers, so as to allow for internal amendatory expansion of each law by the insertion of new sections in proper logical connection.

ARTICLE 3

Directors and Officers

Section 25. Directors.

26. Change of number of directors.
27. When acts of directors void.
28. Liability of directors for making unauthorized dividends.
29. Liability of directors for loans to stockholders.
30. Officers.
31. Inspectors and their oath.
32. Books to be kept.
33. Stock books of foreign corporations.
34. Annual report to Secretary of State.
35. Liability of officers for false certificates, reports or public notices.

§ 25. **Directors.** The directors of every stock corporation shall be chosen at the time and place fixed by the by-laws of the corporation by a plurality of the votes at such election. Each director shall be a stockholder unless otherwise provided in the certificate, or in a by-law adopted by a stockholders' meeting. Vacancies in the board of directors shall be filled in the manner prescribed in the by-laws. Notice of the time and place of holding any election of directors shall be given by publication thereof, at least once in each week for two successive weeks immediately preceding such election, in a newspaper published in the county where such election is to be held, and in such other manner as may be prescribed in the by-laws. Policyholders of an insurance corporation shall be eligible to election as directors, whether or not they be stockholders. At least one-fourth in number of the directors of every stock corporation shall be elected annually.

Formerly L. 1890, ch. 564, § 20, as am'd by L. 1892, ch. 688; L. 1901, ch. 354; L. 1906, ch. 238.

The amendment of 1901 omitted the provisions that directors shall be chosen from the stockholders, and that if a director shall cease to be a stockholder his office shall become vacant. Persons who are not stockholders may now be directors if the certificate of incorporation or a by-law adopted by a stockholders' meeting so provides.

For form of notice of annual meeting, see Form No. 20.

For form of waiver of notice of annual meeting, see Form No. 21.

For forms of oath of inspectors of election and certificate of result, see Forms Nos. 22, 23.

Cross References.

The term directors, includes trustees. Gen. Corp. Law, § 3, ante.

At least one director must be a resident of this State. Gen. Corp. Law, § 34, ante.

No liability for dissolution arises from failure to elect directors on the day fixed in the by-laws. Gen. Corp. Law, § 28, ante. But see the Stock Corp. Law, § 27, as to neglect or refusal of directors to adopt by-laws for holding annual election.

Unless others are appointed by the court the directors shall be

trustees of creditors, etc., in case of dissolution. Gen. Corp. Law, § 35, ante.

The number of directors may be changed. See next succeeding section.

By-laws adopted at a meeting of members of the corporation control action of directors. Gen. Corp. Law, § 11, subd. 5, ante. Any by-law adopted by directors, regulating election of directors or officers, must be published. *Id.*

The directors may appoint officers of the corporation. See § 30 of this law.

The directors shall manage the affairs of every corporation and a majority of the board of directors constitutes a quorum. Gen. Corp. Law, § 34, ante. And the act of a majority at a meeting having a quorum is the act of the board. Gen. Corp. Law, §§ 34 and 43.

At elections of directors each stockholder has one vote for every share of stock held by him, unless otherwise provided in the certificate of incorporation. Gen. Corp. Law, § 23, ante.

For liability of directors for unauthorized dividends, loans to stockholders, etc., see §§ 28 and 29 of this law, post.

Whenever, under the provisions of any of the corporate laws, a corporation is authorized to take any action by the agreement or action of its directors, managers or trustees, such agreement or action may be taken by such directors, regularly convened as a board, and acting by a majority of a quorum, except when otherwise expressly required by law or the by-laws of the corporation. Gen. Corp. Law, § 43.

At any meeting at which every member of the board of directors shall be present, though held without notice, any business may be transacted which might have been transacted if the meeting had been duly called. Gen. Corp. Law, § 43.

For other decisions applicable to the provisions of the foregoing section, see the cases cited under § 23, Gen. Corp. Law.

For penal provisions relative to misconduct of directors, see Penal Law provisions, post.

A special meeting for electing directors may be called. Gen. Corp. Law, §§ 29, 30, 31, ante. In certain cases any member of the corporation may call such meeting. *Id.*

As to proceedings to compel directors to account for their official conduct, to transfer to the corporation property belonging to the same, etc., or for the removal of such director, see Gen. Corp. Law, §§ 90-92, and §§ 307, 308, ante.

As to inspectors of election and their election, see § 31 of this law, post.

Election of Directors.

The certificate of incorporation may provide that the holders of preferred stock shall be deprived of the right to vote at elections of directors. *Peo. ex rel. Browne v. Koenig*, 133 App. Div. 756.

The notice prescribed in the by-laws must be given, in addition to that required by statute. *Matter of Keller*, 116 App. Div. 58.

At a meeting for the election of directors, any number of stock-

holders, however small their holding, provided they hold a plurality of the stock voted, may elect directors, notwithstanding a by-law to the contrary. *Matter of Rapid Transit Ferry Co.*, 15 App. Div. 530, revsg. in part, 19 Misc. 409.

Where a candidate at a corporate election receives a majority of the legal votes cast, the receipt of illegal votes will not defeat his election. *Argus Co. v. Manning*, 138 N. Y. 557.

Meetings of directors of corporations organized under or subject to the provisions of the Business Corporations Law may be held outside the State unless otherwise expressly provided in the certificate of incorporation or in the by-laws. *Business Corp'n. Law*, § 2.

Married Women May be Directors.

Women, either married or single, if of full legal age, may become directors. *People v. Webster*, 10 Wendell 554. However, another ruling in this case to the effect that when a married woman sues, or is sued, her husband must be joined with her, has been superseded by the enactment of ch. 381, Laws of 1884 (now Domestic Relations Law, § 51). For the full text of said section, see *Gen. Corp. Law*, § 4.

Infants May Not Be Directors.

Infants are ineligible to election as directors, as the statutes clearly contemplate that the persons entrusted with the management of the affairs of a corporation must be *sui juris*. *In re Globe Mut. Benefit Assn.*, 135 N. Y. 280, and *s. c.*, 63 Hun 263.

Quorum of Directors and Powers of Majority.

For the above topic, see *Gen Corp. Law*, § 34.

§ 26. **Change of number of directors.** The number of directors of any stock corporation may be increased or reduced, but not below the minimum number prescribed by law, when the stockholders owning a majority of the stock of the corporation shall so determine, at a meeting to be held on two weeks' notice in writing to each stockholder of record. Such notice shall be served personally or by mail, directed to each stockholder at his last known post-office address. Proof of the service of such notice shall be filed in the office of the corporation at or before the time of such meeting. The proceedings of such meeting shall be entered in the minutes of the corporation and a transcript thereof verified by the president and secretary of the meeting shall be filed in the

offices where the original certificates of incorporation were filed. Such increase or reduction may also be effected by unanimous consent without a meeting, in which case there shall be filed in the offices herein specified the unanimous consent of the stockholders in writing, signed by them, or their duly authorized proxies, but no such consent shall be valid unless there is annexed thereto an affidavit of the custodian of the stock book of such corporation stating that the persons who have signed such consent, either in person or by proxy, are the holders of record of the entire capital stock of said corporation issued and outstanding. If a corporation formed under or subject to the banking law, the consent of the superintendent of banks, and if an insurance corporation, the consent of the superintendent of insurance, shall be first obtained to such increase or reduction of the number of directors. This section shall apply to any stock corporation whether organized under a general or special law, and the number of directors may be increased as hereby provided notwithstanding the maximum number of directors now prescribed by law. If the number of directors be increased, the additional directors authorized by such increase shall be elected by the votes of a majority of the directors in office at the time of the increase. If the original or an amended certificate of incorporation of the corporation shall provide that the directors shall be divided into two or more classes, whose terms of office shall respectively expire at different times, the additional directors shall be divided among such classes as nearly as practicable in proportion to the respective numbers of directors constituting each class prior to such increase.

Formerly L. 1890, ch. 564, § 21, as am'd by L. 1892, ch. 688; L. 1903, ch. 320; L. 1904, ch. 307; L. 1905, ch. 750; L. 1909, ch. 421.

For certificates of change of number of directors, see Forms Nos. 39-42.

Amendatory Changes.

The provisions authorizing a change of the number of directors by unanimous consent without a meeting were inserted by L. 1904, ch. 307.

The last two sentences were added by L. 1905, ch. 750.

By L. 1909, ch. 421, amending L. 1909, ch. 61 (The Consolidation Act), a provision requiring the meeting of stockholders to be held at the usual place of meeting of the directors was stricken out.

Filing of Transcript.

The verified transcript above provided for must be filed and recorded in the office of the Secretary of State and a duplicate original must also be filed and recorded in the county clerk's office in which the certificate of incorporation was filed. Gen. Corp. Law, § 5.

§ 27. When acts of directors void. When the directors of any corporation for the first year of its corporate existence shall hold over and continue to be directors after the first year, because of their neglect or refusal to adopt the by-laws required to enable the stockholders to hold the annual election for directors, all their acts and proceedings while so holding over, done for and in the name of the corporation, designed to charge upon it any liability or obligation for the services of any such director, or any officer, or attorney or counsel appointed by them, and every such liability or obligation shall be held to be fraudulent and void.

Formerly L. 1890, ch. 564, § 22, re-enacted without change by L. 1892, ch. 688.

No liability for a dissolution arises from failure to elect directors on the day fixed in the by-laws. Gen. Corp. Law, § 28.

In certain cases any member of the corporation may call a meeting to elect directors. Gen. Corp. Law, § 29.

§ 28. Liability of directors for making unauthorized dividends. The directors of a stock corporation shall not make dividends, except from the surplus profits arising from the business of such corporation, nor divide, withdraw or in any way pay to the stockholders or any of them, any part of the capital of such corporation, or reduce its capital stock, except as authorized by law. In case of any violation of the provisions of this section,

the directors under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large upon the minutes of such directors at the time, or were not present when the same happened, shall jointly and severally be liable to such corporation and to the creditors thereof to the full amount of any loss sustained by such corporation or its creditors respectively by reason of such withdrawal, division or reduction. But this section shall not prevent a division and distribution of the assets of any such corporation remaining after the payment of all its debts and liabilities upon the dissolution of such corporation or the expiration of its charter; nor shall it prevent a corporation from accepting shares of its capital stock in complete or partial settlement of a debt owing to the corporation, which by the board of directors shall be deemed to be bad or doubtful.

Formerly L. 1890, ch. 564, § 23, as am'd by L. 1892, ch. 688; L. 1901, ch. 354.

Prior to the amendment of 1901 directors violating this section were liable to the corporation and its creditors for the full amount of the unauthorized dividend, but by the terms of the amendment the penalty has been mitigated. The last clause of the section is new.

This section applies to foreign as well as domestic corporations. See § 70 of this law.

As to other actions against directors or trustees for misconduct, see Gen. Corp. Law, §§ 90-93 and 307-8, post, and for penal provisions relative thereto, see Penal Law, §§ 664-667 and 890, post.

Directors are liable for loans to stockholders, see § 29 of this law.

Duty to Declare Dividend.

Where the surplus property applicable to a dividend is ample and the directors in bad faith, and without reasonable cause, refuse to declare one, the court will direct the declaration of a reasonable dividend. *Hiscock v. Lacy*, 9 Misc. 578.

When a corporation has a surplus, it rests in the fair and honest discretion of the directors, uncontrollable by the courts whether a dividend shall be declared. *Williams v. W. U. Telegraph Co.*, 93 N. Y. 162, 192; *Burden v. Burden*, 159 N. Y. 287.

A stockholder cannot enforce the payment of a dividend and enjoin the accumulation of a surplus by the directors of his corporation, so long as they are acting honestly and within their discretionary powers. *Burden v. Burden*, 159 N. Y. 287; affirming 8 App. Div., 160.

Directors have no right to pay dividends unless they leave the capital stock unimpaired. *Berwind-White Coal Mining Co. v. Ewart*, 90 Hun 60, affg. 11 Misc. 490.

Amount of Dividend.

The rate of dividend and the amount of surplus rest in the fair and honest discretion of the directors. *McNab v. McNab & H. Mfg. Co.*, 62 Hun 18, affd., 133 N. Y. 687; *Beveridge v. N. Y. El. R. R. Co.*, 112 N. Y. 1; *Reynolds v. Bk. of Mt. Vernon*, 6 App. Div. 62.

The term capital as used in this section means the property of the corporation contributed by its stockholders or otherwise obtained by it, to the extent required by its charter. When the property exceeds that limit the excess is surplus and may be divided in money or property or by a scrip dividend. *Williams v. W. U. T. Co.*, 93 N. Y. 188; *Burrall v. Bushwick R. R. Co.*, 75 N. Y. 211.

This section is intended to prevent the division, distribution, withdrawal and reduction of the property of a corporation below the sum limited in its charter. *Williams v. W. U. T. Co.*, 93 N. Y. 187; *Rorke v. Thomas*, 56 N. Y. 559.

To Whom Payable.

Dividends are payable to the person in whose name the stock stands on the books of the corporation or his legal representatives. Officers are not required to demand production of the stock certificate before paying dividends. *Brisbane v. D. L. & W. R. R. Co.*, 94 N. Y. 204; *Jermain v. L. S. & M. S. Ry. Co.*, 91 N. Y. 483; *Boardman v. Same*, 84 N. Y. 157.

After a dividend is declared, it is, in legal contemplation, severed from the assets of the corporation and is thereafter held in trust for the person who was the stockholder at the time when the dividend was declared. *McGill v. Holmes, Booth & Haydens*, 23 Misc. 524.

Declared dividends payable at a future time, are no longer part of the corporate assets, but become at once the property of the shareholders, and are held by the corporation simply as a trustee for the shareholder. *Matter of Kernochan*, 104 N. Y. 618, 624; *Hopper v. Sage*, 112 N. Y. 530; *Jermain v. L. S. & M. S. Ry. Co.*, 91 N. Y. 488, 492; *People ex rel. U. S. Trust Co. v. Barker*, 86 Hun 131.

Power to Purchase Its Own Stock.

In the absence of statutory prohibition, a corporation may buy its own stock, at least with its profits, but where stockholders, by a majority vote, authorize the directors to buy the stock of certain stockholders and pay therefor in property constituting nearly all the corporate assets in fraud of the rights of dissenting stockholders they should be enjoined. *Lowe v. Pioneer Threshing Co.*, 70 Fed. 646.

Stock held by the corporation which issues it cannot be voted or receive dividends, and has none of the usual rights or powers. *Ex parte Holmes*, 5 Cow. 426.

A director who concurs in any vote or act by which it is intended to apply any portion of the funds of the corporation, except surplus profits, to the purchase of shares of its own stock is guilty of a misdemeanor. Penal Law, § 664.

Liabilities of Directors.

Directors are not personally liable to stockholders for a declared dividend until it has been set aside from the corporate asset so as to become a trust fund in their hands. *Searles v. Gebbie*, 115 App. Div. 778, *affd.*, 190 N. Y. 533.

A director who is not present when an unlawful dividend is declared is not liable, even though he is present at a subsequent meeting when the minutes of a former meeting are ratified. *Hutchinson v. Curtiss*, 45 Misc. 484.

A director who concurs in any vote or act by which it is intended to pay a dividend, except from the surplus profits arising from the business of the corporation, and in the cases and manner allowed by law, is guilty of a misdemeanor. Penal Law, § 664.

A director who votes to declare a dividend when there are no net earnings to justify the same, cannot escape liability upon the ground that he was ignorant of the financial status of the corporation; if a director present at a meeting at which such dividend is voted, dissented therefrom, and desires to be relieved from liability he should cause his dissent to be entered at large upon the minutes of the directors at the time. *Wesp v. Muckle*, 136 App. Div. 241.

§ 29. Liability of directors for loans to stockholders. No loan of moneys shall be made by any stock corporation, except a moneyed corporation, or by any officer thereof out of its funds to any stockholder therein, nor shall any such corporation or officer discount any note or other evidence of debt, or receive the same in payment of any instalment or any part thereof due or to become due on any stock in such corporation, or receive or discount any note, or other evidence of debt, to enable any stockholder to withdraw any part of the money paid in by him on his stock. In case of the violation of any provision of this section, the officers or directors making such loan, or assenting thereto, or receiving or discounting such notes or other evidences of debt, shall, jointly and severally, be personally liable to the extent of such loan and interest, for all the debts of the corporation contracted before the repayment of the sum loaned, and to the full amount of the notes or other evidences of

debt so received or discounted, with interest from the time such liability accrued.

Formerly L. 1890, ch. 564, § 25, as am'd by L. 1892, ch. 688.

For further penalty, see Penal Law, § 664, subd. 2, post.

The officers making or assenting to any loan of its money to stockholders are personally liable for debts of the corporation contracted before payment of such loan. *Boynton v. Hatch*, 47 N. Y. 225.

The principal object of this section is to prevent a reduction of capital under cover of loans to stockholders. It is intended for the protection of creditors. *A. C. Nellis Co. v. Nellis*, 62 Hun 63, 67, 41 St. Rep. 599.

§ 30. Officers. The directors of a stock corporation may appoint from their number a president, and may appoint a secretary, treasurer, and other officers, agents and employees, who shall respectively have such powers and perform such duties in the management of the property and affairs of the corporation, subject to the control of the directors, as may be prescribed by them or in the by-laws. The directors may require any such officer, agent or employee to give security for the faithful performance of his duties, and may remove him at pleasure. The policyholders of an insurance corporation shall be eligible to election or appointment as its officers.

Formerly L. 1890, ch. 564, § 27, as am'd by L. 1892, ch. 688.

This section is permissive, but the corporation must have a president and a secretary, or treasurer, as stock certificates must be signed by two officers. See § 50, post. It will probably be found convenient, to secure compliance with the law in the absence of an officer, to have a president, vice-president, a secretary and a treasurer. The two last named need not be directors, but the president must be chosen from among the directors, and the vice-president should be a director, if given authority in the by-laws to act as president in the latter's absence. One person may hold two offices. While the president must be a director, he need not be a stockholder if the certificate of incorporation, or a by-law adopted by the stockholders, provides that directors are not required to be stockholders. Stock Corp. Law, § 25.

Compensation of Officers.

An express contract is not necessary to entitle a person to compensation for acting as an officer of a corporation of which he is neither a director nor stockholder. *Smith v. Long I. Ry.*, 102 N. Y. 190.

Officers who are either stockholders or directors are not entitled

to compensation unless the same has been provided for. *Mather v. Eureka N. Co.*, 118 N. Y. 629.

A person who is both a stockholder and director cannot sustain a claim for salary as president unless founded on a contract. *Starbuck v. Housatonic R. R. Co.*, 83 Hun 534.

Resignation.

When an officer has tendered his resignation, to take effect immediately, in a letter delivered to the president, the resignation is complete and is not dependent upon acceptance by the directors or upon the election of his successor. *Manhattan Co. v. Kaldenberg*, 165 N. Y. 1, revsg. 27 App. Div. 31.

The acceptance of an officer's resignation is ordinarily not necessary to make it effective. *Zeltner v. Zeltner Brewing Co.*, 174 N. Y. 247, affg., 79 App. Div. 136.

Individual Liability.

Officers are not individually liable if it appears on the face of the instrument that they contracted with reference to corporate business and had authority to make such contract. *Whitford v. Laidler*, 94 N. Y. 145.

Where the officers signed an agreement in their individual names, adding the title of the office held by each after his signature, and the character in which they assumed to act is known to the person dealing with them, the agreement is that of the corporation and not that of its officers. *Groves v. Acker*, 85 Hun 492; *Bush v. Gilmore*, 41 App. Div. 89.

Where individuals sign a promissory note, and after their respective names write "Pres." and "Treas." it is their individual obligation and not the obligation of the corporation, if there is nothing in the body of the note to indicate that it is a corporate obligation, even though the name of the corporation be printed on the margin. *First Nat. Bk. of Bklyn. v. Wallis*, 150 N. Y. 455, affg. 84 Hun 376.

§ 31. Inspectors and their oath. The inspectors of election of every stock corporation shall be appointed in the manner prescribed in the by-laws, but the inspectors of the first election of directors and of all previous meetings of the stockholders shall be appointed by the board of directors named in the certificate of incorporation. No director or officer of a moneyed corporation shall be eligible to election or appointment as inspector. Each inspector shall be entitled to a reasonable compensation for his services, to be paid by the corporation, and if any inspector shall refuse to serve, or neglect to attend at the election, or his office become vacant, the meeting

may appoint an inspector in his place unless the by-laws otherwise provide. The inspectors appointed to act at any meeting of the stockholders shall, before entering upon the discharge of their duties, be sworn to faithfully execute the duties of inspector at such meeting with strict impartiality, and according to the best of their ability, and the oath so taken shall be subscribed by them, and immediately filed in the office of the clerk of the county in which such election or meeting shall be held, with a certificate of the result of the vote taken thereat.

Formerly L. 1890, ch. 564, § 28, as am'd by L. 1892, ch. 688.

For form of certificate and oath of inspectors, see post, Forms Nos. 22, 23.

This section provides no penalty for failure to comply therewith and in practice is frequently disregarded.

Violation of oath or dishonest or corrupt conduct by an inspector constitute a misdemeanor. Penal Law, § 668, post.

For other provisions relative to corporate elections, see Stock Corp. L. § 25, and Gen. Corp. L. §§ 23-31, and notes under said sections.

Unless the by-laws of the company provide that the inspectors shall be stockholders, other persons may be chosen.

The use of the word "inspectors" requires that there shall be at least two. *In re Lighthall Mfg. Co.*, 47 Hun 258.

An election will not be set aside on the ground that inspectors were not sworn in the form prescribed by statute; and it seems that if no objection was interposed at the time of the election, it will stand, although no oath whatever was administered. *In re Mohawk & H. R. R. Co.*, 19 Wend. 135 *Merritt v. Village of Portchester*, 71 N. Y. 309, revsg. 8 Hun 40.

Inspectors may be candidates. *Ex parte Willcocks*, 7 Cow. 402.

The requirement that the oath of inspectors be filed with the county clerk is directory only, and failure to comply does not invalidate the election. *Union Nat'l Bk. v. Scott*, 53 App. Div. 65.

§ 32. Books to be kept. Every stock corporation shall keep at its office correct books of account of all its business and transactions, and a book to be known as the stock book, containing the names, alphabetically arranged, of all persons who are stockholders of the corporation, showing their places of residence, the number of shares of stock held by them respectively, the time when they respectively became the owners thereof, and

the amount paid thereon. The stock book of every such corporation shall be open daily, during at least three business hours, for the inspection of its stockholders and judgment creditors, who may make extracts therefrom. No transfer of stock shall be valid as against the corporation, its stockholders and creditors for any purpose except to render the transferee liable for the debts of the corporation to the extent provided for in this chapter, until it shall have been entered in such book as required by this section, by an entry showing from and to whom transferred. The stock book of every such corporation and the books of account of every bank shall be presumptive evidence of the facts therein so stated in favor of the plaintiff, in any action or proceeding against such corporation or any of its officers, directors or stockholders. Every corporation that shall neglect or refuse to keep or cause to be kept such books, or to keep any book open for inspection as herein required, shall forfeit to the people the sum of fifty dollars for every day it shall so neglect or refuse. If any officer or agent of any such corporation shall wilfully neglect or refuse to make any proper entry in such book or books, or shall neglect or refuse to exhibit the same, or to allow them to be inspected and extracts taken therefrom as provided in this section, the corporation and such officer or agent shall each forfeit and pay to the party injured a penalty of fifty dollars for every such neglect or refusal, and all damages resulting to him therefrom.

Formerly L. 1890, ch. 564, § 29, as am'd by L. 1892, ch. 688; L. 1900, ch. 128; L. 1901, ch. 354.

For form of stock book, see post, Form No. 27.

By the amendment of 1901 the stock book is required to be open for inspection during only three hours each day, leaving the rest of the day free for the use of the books in the proper work of the corporation.

Cross References.

For misdemeanors in relation to corporate books, see Penal Law, § 665, post.

Stock book is evidence of stockholders' right to vote at corporate meetings. See Gen. Corp. Law, § 23.

Although the stock book of a domestic corporation is to be kept open during only three hours each day, a different provision applies to foreign corporations, as the stock book of such corporations must be kept open daily during business hours. Stock Corp. Law, § 33.

Stock Book.

A book containing the names of the owners of shares, the number of shares held by each, and the amount paid thereon, answers the requirements of the statute and is a stock book, although called by a different name. *Buker v. Steele*, 43 N. Y. Supp. 346.

If deprived of possession of the stock book the directors may open a new one, making it so far as possible a copy of the old book, and the inspectors of election may refer to the new book, but if the old book is produced, the record therein must govern as to transfers before the new book was opened. *Matter of Schoharie Valley R. R. Co.*, 12 Abb. N. S. 394. To the same effect, *Argus Co. v. Manning*, 138 N. Y. 557; *Socorro Mt. Mining Co. v. Preston*, 17 Misc 220.

The right of a stockholder to inspect the stock book is absolute. It is not dependent upon the motive or purpose with which it is sought. If the request to inspect is made by a stockholder during the hours prescribed by statute and inspection is refused the stockholder may enforce his right by mandamus. If the stock book, at the time of the request, was, in good faith, in actual use for corporate purposes the stockholder may be compelled to wait a reasonable time until such use terminates. *Henry v. Babcock & Wilcox Co.*, 196 N. Y. 302. The right to inspect the stock book includes the right to make extracts therefrom. *Cotheal v. Brouwer*, 5 N. Y. 562. Although the right to inspect the stock book is absolute under the statute, and not left to the discretion of the court, yet in granting of a writ of mandamus proper precautions may be taken as to time and place so as to prevent interruption of business, or other serious inconvenience. *Matter of Steinway*, 159 N. Y. 250.

Inspection of Books of Account.

There is no statutory authority vesting the stockholder with the right to inspect books of account and records; however, his common law right to such inspection in good faith still exists, unimpaired by legislation, and may be enforced by the supreme court for a definite and honest purpose at reasonable times. *Matter of Steinway*, 159 N. Y. 250.

Respecting the general business books of a corporation, the court will not order an inspection unless the stockholder seeks to learn something which he has the right to know for his own protection, and his application must be in good faith and not for the purpose of injuring or annoying the corporation, but the right to inspect the stock book is an absolute statutory right conferred by this section irrespective of the stockholder's motives in demanding an inspection. *Peo. ex rel. Callanan v. Keeseville, A. C. & L. C. R. R. Co.*, 106 App. Div. 349.

The right to inspect books and papers is not an absolute one, and before such inspection will be granted the stockholder must establish that the information desired has been refused after a demand made therefor, and that it is necessary for him to have the information to protect his interest in the corporation. *Matter of Latimer v. Herzog Teleseme Co.*, 75 App. Div. 522.

§ 33. Stock books of foreign corporations. Every foreign stock corporation having an office for the transaction of business in this state, except moneyed and railroad corporations, shall keep therein a book to be known as a stock book, containing the names, alphabetically arranged, of all persons who are stockholders of the corporation, showing their places of residence, the number of shares of stock held by them respectively, the time when they respectively became the owners thereof, and the amount paid thereon. Such stock book shall be open daily, during business hours, for the inspection of its stockholders and judgment creditors, and any officer of the state authorized by law to investigate the affairs of any such corporation. If any such foreign stock corporation has in this state a transfer agent, whether such agent shall be a corporation or a natural person, such stock book may be deposited in the office of such agent and shall be open to inspection at all times during the usual hours of transacting business, to any stockholder, judgment creditor or officer of the state authorized by law to investigate the affairs of such corporation. For any refusal to allow such book to be inspected, such corporation and the officer or agent so refusing shall each forfeit the sum of two hundred and fifty dollars to be recovered by the person to whom such refusal was made.

Formerly L. 1890, ch. 564, § 53, as am'd by L. 1892, ch. 688; L. 1897, ch. 384.

CONSOLIDATORS' NOTE.—Former § 53 is transferred to this article for the reason that it relates to books to be kept by foreign corporations and should follow section 32 (former section 29), which relates to books to be kept by domestic corporations.

For other provisions affecting foreign corporations, see the index.

Although the stock book of a foreign corporation is required to be kept open daily during business hours, a different provision governs domestic corporations whereby the stock book of such corporations is to be kept open during only three hours each day for inspection of stockholders and judgment creditors. Stock Corp. Law, § 32.

For misdemeanors in relation to corporate books, see Penal Law, sec. 665, post.

Application of Section.

This section applies only to foreign stock corporations having an office for the transaction of business in this State. *Fuller v. O'Connor*, 61 Misc. 279; *Peo. ex rel. Singer v. Knickerbocker Trust Co.*, 38 Misc. 446.

General Books of Account.

A foreign corporation by suing a citizen in this State subjects itself to the jurisdiction of the court and may be required to allow an inspection of its books and papers, although the same are in a foreign jurisdiction. When such books are in daily use in such jurisdiction, a verified copy of the required items should only be allowed, with permission for the defendant to inspect the books themselves in the foreign jurisdiction, if, after the service of the copy, he so desires. *Nat'l Distilling Co. v. Van Enden*, 128 App. Div. 746.

§ 34. Annual report to secretary of state. Every domestic stock corporation and every foreign stock corporation doing business within this state, except moneyed and railroad corporations, shall annually, during the month of January, or, if doing business without the United States, before the first day of May, may make a report as of the first day of January, which will state:

1. The amount of its capital stock, and the proportion actually issued.
2. The amount of its debts or an amount which they do not exceed.
3. The amount of its assets or an amount which its assets at least equal.
4. The names and addresses of all the directors and officers of the company, and in the case of a foreign corporation, the name also of the person designated in the manner prescribed by the code of civil procedure, as

a person upon whom process against the corporation may be served within this state.

Such report shall be made by the president or a vice-president or the treasurer or a secretary of the corporation and shall be filed in the office of the secretary of state. If such report be not so made and filed, any such officer who shall thereafter neglect or refuse to make and to file such report, within ten days after written request so to do shall have been made by a creditor or by a stockholder of the corporation, shall forfeit to the people the sum of fifty dollars for every day he shall so neglect or refuse.

Formerly L. 1890, ch. 564, § 30, as am'd by L. 1892, ch. 2, and ch. 688; L. 1897, ch. 384; L. 1901, ch. 354; L. 1905, ch. 415.

For form of report, see post, Form No. 28.

Subdivision 4 of this section was added by L. 1905, ch. 415.

In addition to the foregoing requirements the report should state the amount of stock, if any, issued for property, as required by section 55 of this law.

Former section 34 of the Stock Corp. Law, added thereto by L. 1899, ch. 354, was repealed by L. 1909, ch. 61, enacting the present Consolidated Stock Corporation Law. Said former section 34, among other things, provided a short statute of limitations respecting the liability of directors for the creation of an excessive indebtedness and for failure to file an annual report. Former section 24 of said law, which imposed the liability for creating an excessive indebtedness, was repealed by L. 1901, ch. 354. The statutory liability which former section 34 limited having been thus repealed, there was no further use for a short statute of limitations as to the liability for excessive indebtedness which no longer existed. The same is true as to the liability to creditors for failure to file an annual report. There is no longer any liability to creditors for failure to file an annual report, and there is consequently no need of a limitation of any such liability. The present section 34 (former § 30) provides only for a penalty to the people and not to creditors and that only after notice to file a report has been served upon an officer of the corporation. Said former section 24 prohibited any stock corporation, except a moneyed corporation from creating any debt, if thereby its total indebtedness not secured by mortgage, exceeded the amount of its paid-up capital stock, and it provided further that the directors consenting to the creation of any such debt should be personally liable therefor to the creditors of the corporation. Since the repeal of said section a corporation is allowed to borrow as much as its credit and security will permit without reference to the amount of its capital stock.

The provisions of this section have been greatly modified by the amendments of 1901. The report is not required to be sworn to, nor to be filed with the county clerk, and the duty of making and filing it in the office of the Secretary of State has been transferred from directors to the executive officers of the corporation. The unreasonable penalties imposed upon directors for failure or neglect on their part to file the perfunctory annual report have been stricken from the statute. The old law has been the cause of much anxiety to innocent and well-meaning directors, and the necessity for this change had become imperative. A failure or neglect on the part of the officers of a company to perform this duty of filing a report no longer renders every director individually liable for the debts of the corporation, but in lieu thereof imposes the liability to a fine of \$50 a day upon the officer who thus fails to file a report, but only after he has been requested in writing by a stockholder or a creditor to file it. This is modeled upon the requirement of the New Jersey statute.

This section applies to both foreign and domestic corporations. For other provisions affecting foreign corporations, see Index under "Foreign Corporations."

The decisions construing former § 30 as it read prior to the modifications made by L. 1901, ch. 354, are not applicable to said section as above amended.

§ 35. Liability of officers for false certificates, reports or public notices. If any certificate or report made or public notice given by the officers or directors of a stock corporation shall be false in any material representation, the officers and directors signing the same shall jointly and severally be personally liable to any person who has become a creditor or stockholder of the corporation upon the faith of any such certificate, report, notice or any material representation therein to the amount of the debt contracted upon the faith thereof if not paid when due, or the damage sustained by any purchaser of or subscriber to its stock upon the faith thereof. The liability imposed by this section shall exist in all cases where the contents of any such certificate, report or notice or of any material representation therein shall have been communicated either directly or indirectly to the person so becoming a creditor or stockholder and he became such creditor or stockholder upon the faith thereof. No action can be maintained for a cause of action created

by this section unless brought within two years from the time the certificate, report or public notice shall have been made or given by the officers or directors of such corporation.

Formerly L. 1890, ch. 564, § 31, as am'd by L. 1892, ch. 688.

The term "directors," as used in this section, includes trustees or other persons by whatever name known, duly appointed to manage the affairs of the corporation. Gen. Corp. Law, § 3.

Under § 30 (now § 34) of the Stock Corp. Law as amended in 1901, directors were relieved from the duty of filing reports and their personal liability in connection therewith abolished, and in addition as former § 24 was repealed by L. 1901, ch. 354, so there can be no such thing as excessive indebtedness nor liability of directors for the creation thereof; and the foregoing section is no longer applicable, except as to matters arising prior to April 16, 1901, when chapter 354 took effect.

Making false report is a misdemeanor. Penal Law, § 665, post.

It is not necessary to show that the officers knew the certificate or report to be false. *Huntington v. Attril*, 118 N. Y. 365; *Torbett v. Eaton*, 113 N. Y. 623, 49 Hun 209.

Officers signing a false report are liable only for debts contracted after the report was filed. *Bagley & Sewall Co. v. Lennig*, 61 App. Div. 26; *Torbett v. Godwin*, 42 St. Rep. 323, 62 Hun 407.

Only those who make false reports are liable. *Bonnell v. Griswold*, 68 N. Y. 294; *Torbett v. Godwin*, 62 Hun 407.

ARTICLE 4

Stock and Stockholders

Section 50. Issue and transfer of stock.

51. Transfers of stock by stockholder indebted to corporation.

52. Purchase of stock of other corporations.

53. Subscriptions to stock.

54. Time of payment of subscriptions to stock.

55. Consideration for issue of stock and bonds.

56. Liabilities of stockholders.

57. Liabilities of stockholders to laborers, servants or employees.

58. Non-liability in certain cases.

59. Limitation of stockholder's liability.

60. Partly paid stock.

61. Preferred and common stock.

62. Increase or reduction of capital stock.

63. Notice of meeting to increase or reduce capital stock.
64. Conduct of such meeting; certificate of increase or reduction.
65. Change in par value of shares.
66. Prohibited transfers to officers or stockholders.
67. Application to court to order issue of new in place of lost certificate of stock.
68. Order of court upon such application.
69. Financial statement of stockholders.
70. Liabilities of officers, directors and stockholders of foreign corporations.

§ 50. Issue and transfers of stock. The stock of every stock corporation shall be represented by certificates prepared by the directors and signed by the president or vice-president and secretary or treasurer and sealed with the seal of the corporation, and shall be transferable in the manner prescribed in this chapter and in the by-laws. No share shall be transferable until all previous calls thereon shall have been fully paid in.

Part of former § 40, ch. 564, L. 1890, as am'd by L. 1892, ch. 688; L. 1902, ch. 601.

For forms of certificate of stock, see post, Forms Nos. 6-9.

This section contains the first two sentences of former § 40, which has been divided by the consolidated laws into three sections (§§ 8, 50 and 52). The places of the other sections have been rearranged so as to follow according to logical sequence and subject-matter. Former § 26 has been placed after § 50, with its number changed to 51. It has been so placed because it relates to the same subject-matter as § 50, which it follows, namely transfers of stock. The remaining portions of § 40 have been re-enacted as §§ 8 and 52.

Stock Certificates.

Certificates of stock of a corporation issued in excess of the limit imposed by its charter are void, and the holder of them is not entitled to the rights, nor subject to the liabilities of a holder of authorized stock. *Scoville v. Thayer*, 105 U. S. 143.

An officer or director of a stock corporation who issues, participates in issuing or concurs in a vote to issue any increase of its capital stock beyond the amount of the capital stock thereof, duly authorized by or in pursuance of law, is guilty of a misdemeanor. Penal Law, § 664, post.

The capital stock is the money contributed to the capital, and is usually represented by shares issued to the subscribers to the stock on the initiation of the corporate enterprise. *Christensen v. Eno*, 106 N. Y. 97; *Burrall v. Bushwick R. R. Co.*, 75 N. Y. 211.

The relation of stockholders is established by the subscription and payment, and does not depend upon the issue of a certificate or other evidence of such right by the corporation. *Rutter v. Kilpatrick*, 63 N. Y. 604.

A subscriber for shares of the original stock becomes a member of the corporation by virtue of his subscription, and the delivery of a certificate for the stock is merely evidence of that relation. *Kohlmetz v. Calkins*, 16 App. Div. 518.

A stockholder has an indivisible interest in the property and assets of the corporation subject to the discharge of its obligations. This indivisible interest is transferred by the transfer of the stockholder's certificate of stock, and a right of action by or in behalf of the corporation constitutes a part of its rights, property and assets in which a stockholder has this indivisible interest which passes by the transfer of his certificate of stock; therefore, a stockholder may bring an action in behalf of the corporation for the benefit of himself and all other stockholders to set aside as fraudulent an improper transaction consummated at the expense of the corporation before he acquired his stock. *Pollitz v. Gould*, 202 N. Y. 11.

The relation of shareholder in a corporation is created by the subscription agreement, and it is not essential to such relation that a certificate of stock be actually issued. *Beals v. Buffalo Expanded Metal Constn. Co.*, 49 App. Div. 589.

Transfer of Stock.

The statutory provision that stock "shall be transferable in the manner prescribed in this chapter and in the by-laws" has reference solely to the transfer of stock from one stockholder to another, and not to the original issue of stock to subscribers. The issue of the original certificates is in no sense a transfer of stock. *Burr v. Wilcox*, 22 N. Y. 551.

The owner of shares of stock may transfer his title by delivery of the certificate with a blank power of attorney indorsed thereon, signed by the owner of the shares named in the certificate, and such a delivery transfers the legal title to the shares as between the parties to the transfer, and not a mere equitable right. *Knox v. Eden Musee Co.*, 148 N. Y. 441, revsg. 74 Hun 483.

A transfer of stock, valid as between the parties, but not entered upon the books of the corporation, does not exempt the transferrer from liability as a stockholder to the creditors of the corporation. *Shellington v. Howland*, 53 N. Y. 371.

As between the vendor and vendee the delivery of the certificate of stock, with the assignment and power indorsed, passes the entire title, legal and equitable, in the shares, notwithstanding that by the terms of the charter or by-laws of the corporation, the stock is declared to be transferable only on its books; such provisions are solely for the protection of the corporation, and can be waived or asserted at its pleasure. *McNeil v. Tenth Nat'l Bk.*, 46 N. Y. 325; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30, 80.

By omitting to register his transfer, the holder of the certifi-

cate fails to obtain the right to vote, risks the collection of dividends, and may also lose his stock by fraudulent transfer on the books of the company, by the registered holder, to a bona fide purchaser. *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30, 80.

The provision empowering a corporation to make by-laws regulating the transfer of its stock merely authorizes it to prescribe the officer by whom the stock shall be transferred and the mode of its transfer. It does not authorize the imposition upon the stock of a penalty limiting the unconditional right of transferring it. *Kinnan v. Sullivan County Club*, 26 App. Div. 213.

The transferee, in good faith and for value, holds his title free from latent equities between prior parties in the line of transmission. But the title of the true owner of a lost or stolen certificate may be asserted against any one subsequently obtaining its possession, although the holder may be a bona fide purchaser. *Knox v. Eden Musee Co.*, 148 N. Y. 441 revsg. 74 Hun 483, distinguishing *McNeil v. Tenth Nat. Bk.*, 46 N. Y. 325; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30.

Refusal to Transfer Stock.

One who has sent a stock certificate to the proper officer to have it transferred and a new certificate issued cannot maintain an action against the officer personally for his refusal to make the transfer. His cause of action is against the corporation. *Cooley v. Curran*, 54 Misc. 221; *id.*, 54 Misc. 572.

The improper refusal of a transfer agent to transfer stock does not render him personally liable for damages to the stockholder. The cause of action is against the corporation. *Dunham v. City Trust Co.*, 115 App. Div. 584, *affd.*, 193 N. Y. 642.

When certificates of stock are transferable without restriction, the corporation cannot discriminate and refuse to transfer certificates to a person who is hostile to it. *Rice v. Rockefeller*, 134 N. Y. 174.

An owner and transferee of stock in a foreign corporation may compel the corporation to recognize the transfer, record it on their books and issue new stock in place of the old. *Ernst v. Elmira Municipal Impt. Co.*, 24 Misc. 583.

Subscriptions to Stock.

A subscription to the certificate of incorporation, with a statement of the number of shares opposite the name, is a binding subscription for the stock, and takes effect upon the filing of the certificate. *Phoenix W. Co. v. Badger*, 67 N. Y. 294; *Powers v. Knapp*, 71 Hun 371.

A subscriber who was an original incorporator of a company, and, as a director, took part for some months, in the conduct of its business, cannot, in an action against him to recover an unpaid balance upon an original stock subscription made for the purpose of organization, question the validity of the organization of the corporation. *United Growers' Co. v. Eisner*, 22 App. Div. 1.

A written agreement to subscribe for shares of stock in a proposed corporation constitutes a valid subscription for such shares, which the corporation, when organized, may elect to enforce. *Non-Electric Fibre Mfg. Co. v. Peabody*, 21 App. Div. 247.

Where the intention of subscribers to stock of a corporation about to be formed is clearly that they shall become stockholders, without further action by them, the corporation, when formed, may accept their subscriptions at any time before revocation. *Avon Springs Sanitarium Co. v. Weed*, 119 App. Div. 560, *revsd. on other grounds*, 189 N. Y. 557; *Buffalo & J. R. R. Co. v. Clarke*, 87 N. Y. 294; *Buffalo & P. R. R. Co. v. Hatch*, 20 N. Y. 157; *Buffalo & N. Y. C. R. R. Co. v. Dudley*, 14 N. Y. 336.

An instrument which, after referring to a plan to form a corporation, states that "the undersigned hereby subscribe for the number of shares set opposite our names," is absolute and unconditional, and is binding when it is acted upon by the corporation then in contemplation of formation. The payment of ten per cent. when the agreement to incorporate is made is not essential to its validity. *Yonkers Gazette Co. v. Taylor*, 30 App. Div. 334; *United Growers' Co. v. Eisner*, 22 App. Div. 1.

§ 51. Transfers of stock by stockholder indebted to corporation. If a stockholder shall be indebted to the corporation, the directors may refuse to consent to a transfer of his stock until such indebtedness is paid, provided a copy of this section is written or printed upon the certificate of stock.

Formerly L. 1890, ch. 564, § 26, as re-enacted by L. 1892, ch. 688.

A lien upon a stock certificate, which contained no reference to any provision limiting or restricting the right to sell the same is not enforceable against the certificate, for an indebtedness to the corporation, in the hands of one who purchased the certificate without knowledge of any such provision or of any existing lien in favor of the corporation even when the provision is contained in the certificate of incorporation. *Lyman v. State Bk. of Randolph*, 81 App. Div. 367, *affd.*, 179 N. Y. 577.

The power conferred upon a corporation, by Gen. Corp. L. § 11, to make by-laws regulating the transfer of stock only authorizes it to prescribe the officer by whom stock shall be transferred and the mode of its transfer. *Kinnan v. Sullivan County Club*, 26 App. Div. 213.

§ 52. Purchase of stock of other corporations. Any stock corporation, domestic or foreign, now existing or hereafter organized, except moneyed corporations, may

purchase, acquire, hold and dispose of the stocks, bonds and other evidences of indebtedness of any corporation, domestic or foreign, and issue in exchange therefor its stock, bonds or other obligations if authorized so to do by a provision in the certificate of incorporation of such stock corporation, or in any certificate amendatory thereof or supplementary thereto, filed in pursuance of law, or if the corporation whose stock is so purchased, acquired, held or disposed of, is engaged in a business similar to that of such stock corporation, or engaged in the manufacture, use or sale of the property, or in the construction or operation of works necessary or useful in business of such stock corporation, or in which or in connection with which the manufactured articles, product or property of such stock corporation are or may be used, or is a corporation with which such stock corporation is or may be authorized to consolidate. When any such corporation shall be a stockholder in any other corporation, as herein provided, its president or other officers shall be eligible to the office of director of such corporation, the same as if they were individually stockholders therein and the corporation holding such stock shall possess and exercise in respect thereof, all the rights, powers and privileges of individual owners or holders of such stock.

Part of former § 40, L. 1890, ch. 564, as am'd by L. 1892, ch. 688; L. 1902, ch. 601. See, also, note under § 50.

Holding Companies.

Stock of subsidiary corporations owned by a holding company constitutes issued and outstanding stock. *McCallum v. Corn Products Co.*, 131 App. Div. 617.

A corporation may acquire by purchase all the stock of another corporation, and yet the latter may continue a distinct and existing organization, with its own officers and board of directors. *Einstein v. Rochester Gas & Electric Co.*, 146 N. Y. 46.

Unless expressly authorized by law so to do, a corporation cannot purchase or deal in stocks of other corporations, but may take such stock in payment of a debt. *Holmes & G. Mfg.*

Co. v. Holmes & W. M. Co., 127 N. Y. 252; Milbank v. N. Y., L. E. & W. R. R. Co., 64 How. 20; Talmage v. Pell, 7 N. Y. 328; Kent v. Quicksilver M. Co., 78 N. Y. 159; Palmer v. Cypress H. Cem., 122 N. Y. 429.

A corporation will not be permitted to acquire a controlling interest in the stock of another corporation when such ownership will defeat the policy of the State in prohibiting combinations for the purpose of stifling competition. Minn. v. Northern Securities Co., 184 U. S. 199; Peo. v. North River Sugar Ref. Co., 121 N. Y. 582.

§ 53. Subscriptions to stock. If the whole capital stock shall not have been subscribed at the time of filing the certificate of incorporation, the directors named in the certificate may open books of subscription to fill up the capital stock in such places and after giving such notices as they may deem expedient, and may continue to receive subscriptions until the whole capital stock is subscribed. At the time of subscribing, every subscriber, whose subscription is payable in money, shall pay to the directors ten per centum upon the amount subscribed by him in cash, and no such subscription shall be received or taken without such payment.

Formerly L. 1890, ch. 564, § 41, as re-enacted by L. 1892, ch. 688.

By the amendment of 1892, ch. 688, the words "whose subscription is payable in money" were inserted in the second sentence. It should be carefully noted that under the amendment it is only the subscriber, "whose subscription is payable in money," who is required to pay ten per cent. in cash at the time of subscribing.

The provisions of this section apply only to subscriptions for stock made subsequent to incorporation. The section has no application whatever to the original subscriptions made by the incorporators and set forth in the certificate of incorporation at the time of the organization of the corporation. United Growers Co. v. Eisner, 22 App. Div. 1; Van Schaick v. Mackin, 129 App. Div. 335; South Buffalo Natural Gas Co. v. Bain, 9 Misc. 425; Phoenix Warehousing Co. v. Badger, 67 N. Y. 294.

Payment of Ten Per Cent.

A subscription after incorporation is not binding until at least ten per cent. has been paid. N. Y. & O. M. R. R. Co. v. Van Horn, 57 N. Y. 473; South Buffalo Natural Gas Co. v. Bain, 9 Misc. 425. Actual payment of such percentage after subscription, with intent to complete the same, satisfies the statute. Beach v. Smith, 30 N. Y. 116; B. R. & U. R. R. Co. v.

Clarke, 25 N. Y. 208. Such payment may be made in services rendered the corporation. *Id.*; *Veeder v. Mudgett*, 95 N. Y. 295.

The giving of a note for ten per cent. of the subscription does not satisfy this section. *Hapgoods v. Lusch*, 123 App. Div. 23. But notes given upon which payment was afterward enforced satisfy the statute. *O. C. & R. R. Co. v. Wolley*, 1 Keyes 118.

§ 54. Time of payment of subscriptions to stock. Subscriptions to the capital stock of a corporation shall be paid at such times and in such instalments as the board of directors may by resolution require. If default shall be made in the payment of any instalment as required by such resolution, the board may declare the stock and all previous payments thereon forfeited for the use of the corporation, after the expiration of sixty days from the service on the defaulting stockholder, personally, or by mail directed to him at his last-known post-office address of a written notice requiring him to make payment within sixty days from the service of the notice at a place specified therein, and stating that, in case of failure to do so, his stock and all previous payments thereon will be forfeited for the use of the corporation.

Such stock, if forfeited, may be reissued or subscriptions therefor may be received as in the case of stock not issued or subscribed for. If not sold for its par value or subscribed for within six months after such forfeiture, it shall be canceled and deducted from the amount of the capital stock. If by such cancellation, the amount of the capital stock is reduced below the minimum required by law, the capital stock shall be increased to the required amount within three months thereafter or an action may be brought or proceedings instituted to close up the business of the corporation as in the case of an insolvent corporation. If a receiver of the assets of the corporation has been appointed, all unpaid subscriptions to the stock shall be paid at such times and in such instalments as the receiver or the court may direct.

Formerly § 43, ch. 564, L. 1890, as am'd by L. 1892, ch. 688.

The location and section number of this section was changed by the consolidated laws so as to follow the section relating to subscriptions to stock.

The second paragraph, providing for reissue, sale or cancellation of forfeited stock, for proceedings to close up affairs of corporation, and for payment of subscriptions in case of receivership, was added by L. 1892, ch. 688.

Action for Unpaid Installments.

The remedy by forfeiture is merely cumulative, and does not prevent an action for the installments until the forfeiture is resorted to. *Troy & Boston R. R. Co. v. Tibbits*, 18 Barb. 297; *Northern R. R. Co. v. Miller*, 10 Barb. 260; *O., R. & C. R. R. Co. v. Frost*, 21 Barb. 541; *Buffalo & N. Y. C. R. R. Co. v. Dudley*, 14 N. Y. 336.

A corporation may enforce payment of the subscriptions to its capital stock against persons who subscribed its articles of association before the corporate body had a legal existence. *Dorris v. French*, 4 Hun 292; *Buffalo & N. Y. C. R. R. Co. v. Dudley*, 14 N. Y. 336; *Troy & Boston R. R. Co. v. Tibbits*, 18 Barb. 297.

When there has been no formal subscription the corporation cannot recover an amount unpaid upon its stock, unless a promise to pay, either express or implied, has been made. If there be no such agreement the remedy is by the sale of the shares of the delinquent members. *Rochester & Kettle Falls Land Co. v. Roe*, 7 App. Div. 366.

Effect of Forfeiture.

After a forfeiture, the holder is divested of his title in the shares, which is then vested in the corporation and remaining stockholders. *Weeks v. Silver Islet C. M. & L. Co.*, 23 J. & S. 1, affd., 120 N. Y. 620.

When stock is declared forfeited, the liability of the holder thereof to the corporation for further payment thereon ceases. *Mills v. Stewart*, 41 N. Y. 389; *Small v. Herkimer Mfg. Co.*, 2 N. Y. 330.

§ 55. Consideration for issue of stock and bonds. No corporation shall issue either stock or bonds except for money, labor done or property actually received for the use and lawful purposes of such corporation. Any corporation may purchase any property authorized by its certificate of incorporation, or necessary for the use and lawful purposes of such corporation, and may issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be full paid stock and not

liable to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this chapter; and in the absence of fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive; and in all statements and reports of the corporation, by law required to be published or filed, this stock shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported as issued for property purchased.

Formerly L. 1890, ch. 564, § 42, as am'd by L. 1892, ch. 688; L. 1901, ch. 534.

This section formerly provided that no stock shall be issued for less than its par value and no bonds for less than the fair market value thereof, but by the amendment of 1901, chapter 354, these restrictions were abolished and the additional provisions inserted, permitting a corporation to purchase any property authorized by its certificate of incorporation, and in the absence of such authorization permitting it to purchase any property necessary for the use and lawful purposes of the corporation and to issue stock to the amount of the value thereof in payment therefor, and declaring stock so issued to be full-paid stock and not liable to any further call. Said amendment also added the provision that "in the absence of fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive." These new features are upon the lines of the English Companies Act and the New Jersey statute upon the same subject. The foregoing important modifications will preclude the serious questions which occasionally occurred under the former practice as to the legality and validity of the issue of stock of a corporation in payment for properties not having a determinable market value.

Issue of Stock for Property.

In determining whether a proper valuation was placed on property received in payment for stock the law makes allowances for variations in the judgment of different men and errors of judgment when honestly made, but does not countenance intentional or fraudulent overvaluations. *Flour City Nat. Bk. v. Shire*, 88 App. Div. 401, *affd.*, 152 N. Y. 647.

Stock issued for good will is issued for property actually received within the meaning of the statute. *Washburn v. Nat'l Wall Paper Co.*, 81 Fed. Rep. 17.

§ 56. Liabilities of stockholders. Every holder of capital stock not fully paid, in any stock corporation, shall

be personally liable to its creditors, to an amount equal to the amount unpaid on the stock held by him for debts of the corporation contracted while such stock was held by him. As to existing corporations the liability imposed by this section shall be in lieu of the liability imposed upon stockholders of any existing corporation, under any general or special law, excepting laws relating to moneyed corporations, and corporations and associations for banking purposes, on account of any indebtedness hereafter contracted or any stock hereafter issued; but nothing in this section contained shall create or increase any liability of stockholders of any existing corporation under any general or special law.

Formerly part of § 57, L. 1890, ch. 564, as am'd by L. 1892, ch. 688, § 54; L. 1901, ch. 354.

Matter contained in this section was the first part of former section 54 (originally L. 1890, ch. 564, § 57). It has been divided into three sections (sections 56, 57, 58), with two new headings for the purpose of making its provisions stand out clearly. It is re-enacted without change of wording and its place in article has been changed so as to follow in logical sequence.

Prior to 1892 it was necessary to file a certificate of full payment of capital stock in order to relieve stockholders from personal liability. This requirement of the statute was eliminated by Laws of 1892 chapter 688. The liability feature was also modified, so as to read as follows: "The stockholders of every stock corporation shall, jointly and severally, be personally liable to its creditors, to an amount equal to the amount of the stock held by them respectively, for every debt of the corporation, until the whole amount of its capital stock issued and outstanding at the time such debt was incurred shall have been fully paid in." But this burdensome liability has also been abolished by Laws of 1901, chapter 534, amending the foregoing section, so that now each stockholder's liability is limited to the amount, if any, remaining unpaid upon his stock, and only for debts of the corporation contracted while such unpaid stock was so held.

Under this section prior to the amendment of 1901 a stockholder was liable to an amount equal to the amount of stock held by him for every debt of the corporation until the whole amount of its capital stock issued and outstanding at the time such debt was incurred should have been fully paid. Under the section as amended a holder of capital stock not fully paid is personally liable only to an amount equal to the amount unpaid on the stock held by him. *Lancaster v. Knight*, 74 App. Div. 255.

A stockholder is liable for debts when his stock has been issued for property which was substantially and intentionally overvalued. *Nat'l Tube Works Co. v. Gilfillan*, 124 N. Y. 302.

If a shareholder, in contemplation of the insolvency of a corporation, in which his stock has not been fully paid for, assigns his shares to an irresponsible person for the purpose of escaping liability, he remains liable to the then existing creditors of the corporation. *Sinclair v. Dwight*, 9 App. Div. 297, *affd.*, 158 N. Y. 607.

Stockholders of Foreign Corporations.

The enforcement of a liability against a resident stockholder for debts of an insolvent foreign corporation does not rest upon the theory that the laws of the foreign State are in force in this State, but upon the contractual obligation he voluntarily assumes to meet the liability by becoming a stockholder. *Howarth v. Angle*, 162 N. Y. 179.

An action for unpaid calls may be maintained in this State by a foreign corporation against a transferee of stock personally served with process in this State and not a resident of, nor subject to, the jurisdiction of another State, after appointment of a Federal receiver in that State. *Sigua Iron Co. v. Brown*, 171 N. Y. 488.

A stockholder's liability to creditors, fixed by a foreign statute creating the corporation, at double the par value of the stock held, is not enforceable in New York since the liability is penal and not contractual. *Knickerbocker Trust Co. v. Ise-lin*, 185 N. Y. 54. The courts of one State will not enforce the penal laws of other States, or allow a recovery for a penalty imposed upon a corporation or its officers by the State in which the corporation was created. *Hutchinson v. Stadler*, 85 App. Div. 424, 430.

§ 57. Liabilities of stockholders to laborers, servants or employees. The stockholders of every stock corporation shall jointly and severally be personally liable for all debts due and owing to any of its laborers, servants or employees other than contractors, for services performed by them for such corporation. Before such laborer, servant or employee shall charge such stockholder for such services, he shall give him notice in writing, within thirty days after the termination of such services, that he intends to hold him liable, and shall commence an action therefor within thirty days after the return of an execution unsatisfied against the corporation upon a judgment recovered against it for services.

Formerly part of § 57, L. 1890, ch. 564, as am'd by L. 1892, ch. 688, § 54; L. 1901, ch. 354. See, also, note to § 56 as to source of section.

§ 58. Non-liability in certain cases. No person holding stock in any corporation as collateral security, or as executor, administrator, guardian or trustee, unless he shall have voluntarily invested the trust funds in such stock, shall be personally subject to liability as a stockholder; but the person pledging such stock shall be considered the holder thereof and shall be liable as stockholder, and the estates and funds in the hands of such executor, administrator, guardian or trustee shall be liable in the like manner and to the same extent as the testator or intestate, or the ward or person interested in such trust fund would have been, if he had been living and competent to act and held the same stock in his own name, unless it appears that such executor, administrator, guardian or trustee voluntarily invested the trust funds in such stocks, in which case he shall be personally liable as a stockholder.

Formerly part of § 57, L. 1890, ch. 564, as am'd by L. 1892, ch. 688, § 54; L. 1901, ch. 354. See, also, note to § 56 as to source of section.

§ 59. Limitation of stockholder's liability. No action shall be brought against a stockholder for any debt of the corporation until judgment therefor has been recovered against the corporation, and an execution thereon has been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable, with costs against the stockholder. No stockholder shall be personally liable for any debt of the corporation not payable within two years from the time it is contracted, nor unless an action for its collection shall be brought against the corporation within two years after the debt becomes due; and no action shall be brought against a stockholder after he shall have ceased

to be a stockholder, for any debt of the corporation, unless brought within two years from the time he shall have ceased to be a stockholder.

Formerly L. 1890, ch. 564, § 58, as re-enacted by L. 1892, ch. 688, § 55.

Condition Precedent.

In order to be entitled to a recovery from a stockholder, the issuance and return unsatisfied of an execution on the judgment which is the foundation of the suit, must be shown. *Terry v. Rothschild*, 83 Hun, 486.

A stockholder is not primarily liable for the debts of the corporation. It is only after the creditor has obtained judgment against the company, issued execution, which has been returned unsatisfied, that he becomes liable. *Close v. Potter*, 155 N. Y. 145, revsg. 11 Misc. 729; *United Glass Co. v. Levett*, 24 Misc. 429.

Statute of Limitations.

The time within which an action must be commenced begins to run on the day when the debt first became due. *Hardman v. Sage*, 124 N. Y. 25; *Jagger Iron Co. v. Walker*, 76 N. Y. 522.

The statute does not begin to run in favor of a stockholder until after the return of execution against the corporation. *Handy v. Draper*, 89 N. Y. 334.

Foreign Corporations.

The limitations of time contained in this section do not apply to foreign corporations. *Bernheimer v. Converse*, 206 U. S. 516.

§ 60. Partly paid stock. The original or the amended certificate of incorporation of any stock corporation may contain a provision expressly authorizing the issue of the whole or of any part of the capital stock as partly paid stock, subject to calls thereon until the whole thereof shall have been paid in. In such case, if in or upon the certificate issued to represent such stock, the amount paid thereon shall be specified, the holder thereof shall not be subject to any liability except for the payment to the corporation of the amount remaining unpaid upon such stock, and for the payment of indebtedness to employees pursuant to sections fifty-seven, fifty-eight and fifty-nine of this chapter; and in any such case, the

corporation may declare and may pay dividends upon the basis of the amount actually paid upon the respective shares of stock instead of upon the par value thereof.

Formerly § 62, added by L. 1901, ch. 354.

This section provides a desirable method for the issue of partly paid stock subject to assessment, with a right to dividends upon the amount actually paid thereon. In case a corporation intends to issue this species of stock a provision to that effect must be inserted in the certificate of incorporation, or in the event that an existing corporation proposes to issue such stock it must make and file an amended certificate, pursuant to Stock Corp. Law, § 18, authorizing the same.

§ 61. Preferred and common stock. Every domestic stock corporation may issue preferred stock and common stock and different classes of preferred stock, if the certificate of incorporation so provides, or by the consent of the holders of record of two-thirds of the capital stock, given at a meeting called for that purpose upon notice such as is required for the annual meeting of the corporation. A certificate of the proceedings of such meeting, signed and sworn to by the president or a vice-president, and by the secretary or assistant secretary, of the corporation, shall be filed and recorded in the offices where the original certificate of incorporation of such corporation was filed and recorded; and the corporation may, upon the written request of the holders of any preferred stock, by a two-thirds vote of its directors, exchange the same for common stock, and issue certificates for common stock therefor, upon such valuation as may have been agreed upon in the certificate of organization of such corporation, or the issue of such preferred stock, or share for share, but the total amount of such capital stock shall not be increased thereby.

Formerly L. 1890, ch. 564, § 47, as am'd by L. 1892, ch. 688, § 47; L. 1901, ch. 354.

For form of certificate of Preferred Stock, see Form No. 8.

As amended in 1901, this section authorizes the classification of stock into common and preferred, and into different classes of preferred stock by a vote of the holders of two-thirds of

the capital stock of the corporation, instead of by unanimous consent, which was required prior to this amendment. This change harmonizes the section with the statutes of nearly all the other States.

The certificate of incorporation may provide when the stock is classified into common and preferred that the holders of one class of stock shall be deprived of voting powers upon questions relating to the management of the corporation. *Peo. ex rel. Browne v. Koenig*, 118 N. Y. Supp. 136.

§ 62. Increase or reduction of capital stock. Any domestic corporation may increase or reduce its capital stock in the manner herein provided, but not above the maximum or below the minimum, if any, prescribed by general law governing corporations formed for similar purposes. If increased, the holders of the additional stock issued shall be subject to the same liabilities with respect thereto as are provided by law in relation to the original capital; if reduced, the amount of its debts and liabilities shall not exceed the amount of its reduced capital, unless an insurance corporation, in which case the amount of its debts and liabilities shall not exceed the amount of its reduced capital and other assets. The owner of any stock shall not be relieved from any liability existing prior to the reduction of the capital stock of any stock corporation. If a banking corporation, whether the capital be increased or reduced, its assets shall at least be equal to its debts and liabilities and the capital stock, as increased or reduced. A domestic railroad corporation may increase or reduce its capital stock in the manner herein provided, notwithstanding any provision contained herein, or in any general or special law fixing or limiting the amount of capital stock which may be issued by it.

Formerly L. 1890, ch. 564, § 44, as am'd by L. 1892, ch. 688; L. 1894, ch. 346; L. 1899, ch. 696; L. 1901, ch. 354.

For forms under this section, see post, Forms Nos. 43-47.

Upon an increase of capital stock a tax of one-twentieth of one per cent. is payable. Tax Law, § 180, ante, page 31.

A corporation organized under the Business Corporations Law is required, after payment of one-half of the capital stock,

to file a certificate of such payment (section 5 of said act), but there is no provision upon an increase of the capital stock for the filing of a certificate of the payment of any part of such increase.

Effect of Amendments.

By the amendment of 1901, ch. 354, the wording of this section was changed in such a manner as to empower a stock corporation created by special act of the Legislature to make an increase or reduction of its capital stock in conformity with this law, notwithstanding any provision in the special act of incorporation, fixing or limiting the amount of the capitalization of such corporation.

§ 63. Notice of meeting to increase or reduce capital stock. Every such increase or reduction must be authorized either by the unanimous consent of the stockholders, expressed in writing and filed in the office of the secretary of state and in the office of the clerk of the county in which the principal business office of the corporation is located, or by a vote of the stockholders owning at least a majority of the stock of the corporation, taken at a meeting of the stockholders specially called for that purpose in the manner provided by law or by the by-laws. Notice of the meeting, stating the time, place and object, and the amount of the increase or reduction proposed, signed by the president or a vice-president and the secretary, shall be published once a week, for at least two successive weeks, in a newspaper in the county where its principal business office is located, if any is published therein, and a copy of such notice shall be duly mailed to each stockholder or member at his last-known post-office address at least two weeks before the meeting or shall be personally served on him at least five days before the meeting.

Formerly L. 1890, ch. 564, § 45, as am'd by L. 1892, ch. 688; L. 1893, ch. 700; L. 1901, ch. 354.

For form of notice of meeting, see post, Form No. 44.

Amendments.

By amendment of 1901, ch. 354, two important changes were made in this section, as follows:

An increase or reduction of capital stock is authorized, without holding a meeting of the stockholders, by filing a written unanimous consent.

When a special meeting of stockholders is to be held for the purpose of increasing or reducing the capital stock, it may be called "in the manner provided by law, or by the by-laws." When called in the manner provided by law, the notice is not required to be signed by a majority of the directors as heretofore, but may be signed only by the president or the vice-president and the secretary. The time for mailing notices for such meetings has been reduced from three weeks to two weeks prior to the meeting, and such mailing may be dispensed with by a personal service of the notice on a stockholder at least five days before the meeting.

Since the enactment of ch. 672, L. 1895, special meetings of stockholders to increase capital stock, without notice of meeting and without the lapse of any period of time, have been sanctioned, provided such action were authorized and the statutory requirements were waived in writing by all the stockholders, pursuant to Gen. Corp. Law, § 42.

§ 64. Conduct of such meeting; certificate of increase or reduction. If, at the time and place specified in the notice, the stockholders shall appear in person or by proxy in numbers representing at least a majority of all the shares of stock, they shall organize by choosing from their number a chairman and secretary, and take a vote of those present in person or by proxy, and if a sufficient number of votes shall be given in favor of such increase or reduction, or if the same shall have been authorized by the unanimous consent of stockholders expressed in writing signed by them or their duly authorized proxies, a certificate of the proceeding showing a compliance with the provisions of this chapter, the amount of capital theretofore authorized, and the proportion thereof actually issued, and the amount of the increased or reduced capital stock, and in case of the reduction of capital stock the whole amount of the ascertained debts and liabilities of the corporation, shall be made, signed, verified and acknowledged by the chairman and secretary of the meeting, and filed in the office of the clerk of the county where its principal place of business shall

be located, and a duplicate thereof in the office of the secretary of state. In case of a reduction of the capital stock, except of a railroad corporation or a moneyed corporation, such certificate or consent hereinafter provided for shall have indorsed thereon the approval of the comptroller, to the effect that the reduced capital is sufficient for the proper purposes of the corporation, and is in excess of its ascertained debts and liabilities; and in case of the increase or reduction of the capital stock of a railroad corporation or a moneyed corporation, the certificate or the unanimous consent of stockholders, as the case may be, shall have indorsed thereon the approval of the public service commission having jurisdiction thereof, if a railroad corporation; of the superintendent of banks, if a corporation formed under or subject to the banking law, and of the superintendent of insurance, if an insurance corporation. When the certificate herein provided for, or the unanimous consent of stockholders in writing, signed by them or their duly authorized proxies, approved as aforesaid, has been filed, the capital stock of such corporation shall be increased or reduced, as the case may be, to the amount specified in such certificate or consent. The proceedings of the meeting at which such increase or reduction is voted, or, if such increase or reduction shall have been authorized by unanimous consent without a meeting, then a copy of such consent shall be entered upon the minutes of the corporation. If the capital stock is reduced, the amount of capital over and above the amount of the reduced capital shall, if the meeting or consent so determine or provide, be returned to the stockholders pro rata, at such times and in such manner as the directors shall determine, except in the case of the reduction of the capital stock of an insurance corporation, as an alternative to make good an existing impairment.

Formerly L. 1890, ch. 564, § 46, as am'd by L. 1892, ch. 688; L. 1893, ch. 700; L. 1901, ch. 354; L. 1902, ch. 286; L. 1904, ch. 123.

The last clause, embodying the exception relative to insurance corporations, was added by L. 1902, ch. 286.

§ 65. Change in par value of shares. The number of shares into which the capital stock of any stock corporation is divided may be increased or reduced by a two-thirds vote of all stock duly represented at a meeting held and conducted in like manner, and upon filing a like certificate, as required for the increase or reduction of its capital stock. If such increase or reduction of the number of shares be so authorized, the corporation shall issue to each stockholder certificates for as many shares of the new stock as equal in par value the shares of the old stock held by him, upon surrender and cancellation of such old stock. This section does not authorize the increase or reduction of the capital stock of such corporation.

Formerly § 56, added by L. 1893, ch. 196, and am'd by L. 1901, ch. 354.

L. 1901, ch. 354, amending this section, made no substantial change.

For form under this section, see post, Form No. 48.

§ 66. Prohibited transfers to officers or stockholders. No corporation which shall have refused to pay any of its notes or other obligations, when due, in lawful money of the United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash. No conveyance, assignment or transfer of any property of any such corporation by it or by any officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent

of giving a preference to any particular creditor over other creditors of the corporation, shall be valid, except that laborers' wages for services shall be preferred claims and be entitled to payment before any other creditors out of the corporation assets in excess of valid prior liens or incumbrances. No corporation formed under or subject to the banking, insurance or railroad law shall make any assignment in contemplation of insolvency. Every person receiving by means of any such prohibited act or deed any property of the corporation shall be bound to account therefor to its creditors or stockholders or other trustees. No stockholder of any such corporation shall make any transfer or assignment of his stock therein to any person in contemplation of its insolvency. Every transfer or assignment or other act done in violation of the foregoing provisions of this section shall be void. No conveyance, assignment or transfer of any property of a corporation formed under or subject to the banking law, exceeding in value one thousand dollars, shall be made by such corporation, or by any officer or director thereof, unless authorized by previous resolution of its board of directors, except promissory notes or other evidences of debt issued or received by the officers of the corporation in the transaction of its ordinary business, and except payments in specie or other current money or in bank bills made by such officers. No such conveyance, assignment or transfer shall be void in the hands of a purchaser for a valuable consideration without notice. Every director or officer of a corporation who shall violate or be concerned in violating any provisions of this section, shall be personally liable to the creditors and stockholders of the corporation of which he shall be director or an officer to the full extent of any loss they may respectively sustain by such violation.

Formerly L. 1890, ch. 564, § 48, as am'd by L. 1892, ch. 688; L. 1901, ch. 354.

Amendments and Effect Thereof.

The amendment of 1901, ch. 354, added the provisions that laborers' wages are entitled to payment as preferred claims out of the corporation assets, in excess of valid prior liens or incumbrances. It also added the sentence prohibiting a corporation formed under or subject to the Banking, Insurance or Railroad Law from making any assignment in contemplation of insolvency.

Scope of the Section.

This section prohibits the following acts:

1. It prohibits officers and directors of an insolvent corporation or of one about to become insolvent, from using their knowledge of its condition and their dominant position for their individual benefit in collecting their own claims, either through a voluntary payment, or through collusive and preferential liens, to the prejudice of other creditors, not so favorably situated.

2. It prohibits a preferential general assignment by a corporation, though it does not forbid assignments without preferences.

3. It prohibits a transfer of any of the corporate assets to an officer, director or stockholder upon any other consideration than the payment of the full value of the property in cash. *O'Brien v. East River Bridge Co.*, 161 N. Y. 539.

Intent to Give Preference.

This section is intended to secure equality among creditors, and forbids all transfers that are intended to give preference or which have that effect in reality. *Kingsley v. First N. Bk.*, 31 Hun 329; *Brouwer v. Harbeck*, 9 N. Y. 589; *Robinson v. Bk. of Attica*, 21 N. Y. 406.

The payment by an insolvent corporation of a debt a few days before it became due constitutes an intent to make a preference when it is shown, that at the time of such payment, debts to other persons were due and unpaid, and that the corporation did not have available assets from which to pay the other debts, although the managers of the corporation expected to get help through other persons. *Baker, as Receiver of Ft. Ann Woolen Co. v. Emerson*, 4 App. Div. 348.

A corporation which makes payments of money to some creditors with the intent to hinder, delay and defraud others, violates this section. *Stiefel v. N. Y. Novelty Co.*, 14 App. Div. 371.

Proof that at the time of a transfer by a corporation it was insolvent is not conclusive evidence of a violation of this provision. The act must have been done because of existing or contemplated insolvency. *Paulding v. Chrome Steel Co.*, 94 N. Y. 334.

Where a corporation suffers a judgment at the instance of a

creditor who, although not a director, substantially controls the company, the judgment is void. *Olney v. Baird*, 7 App. Div. 95.

Where a creditor has a just claim to which the corporation has no defense, and he adopts ordinary court procedure to enforce it, which results in judgment by default, it cannot be properly held to be within the condemnation of the statute, unless the corporation or its officers were guilty of some act besides mere non-resistance to the creditor's efforts to obtain the judgment. *Lopez v. Campbell*, 163 N. Y. 340.

The common-law right of an insolvent corporation to make a general assignment for the benefit of creditors has been restored by the enactment of the foregoing section as amended in 1892, subject, however, to the condition that the assignment must be without preferences. *Croll v. Empire State Knitting Co.*, 17 App. Div. 282.

A stock corporation may make a general assignment without preferences. *Home Bank v. Brewster*, 17 Misc. 442; *Munzinger v. United Press*, 52 App. Div. 338.

Foreign Corporations.

This section applies to such foreign stock corporations only as are engaged in transacting business in this State. Stock Corp. Law, § 70.

A foreign corporation has power to make a general assignment for the benefit of creditors under the laws of this State, provided the assignment is also valid under the law of the domicile of the corporation. *Rogers v. Pell*, 154 N. Y. 518, revsg. 89 Hun 159.

An assignment with preference by a foreign corporation which does not transact business within the State of New York, does not contravene the statutory law of the State of New York, prohibiting transfers of property by an insolvent corporation with an intent to give a preference, nor is it repugnant to its general policy. *Matter of Hulbert Bros. Co.*, 38 App. Div. 323, revsd. on other grounds, 160 N. Y. 9.

§ 67. Application to court to order issue of new in place of lost certificate of stock. The owner of a lost or destroyed certificate of stock, if the corporation shall refuse to issue a new certificate in place thereof, may apply to the supreme court, at any special term held in the district where he resides, or in which the principal business office of the corporation is located, for an order requiring the corporation to show cause why it should not be required to issue a new certificate in place of the one lost or destroyed. The application shall be by petition, duly verified by the owner, stating the name of the corpora-

tion, the number and date of the certificate, if known, or if it can be ascertained by the petitioner; the number of shares named therein, to whom issued, and as particular a statement of the circumstances attending such loss or destruction as the petitioner can give. Upon the presentation of the petition the court shall make an order requiring the corporation to show cause, at a time and place therein mentioned, why it should not issue a new certificate of stock in place of the one described in the petition. A copy of the petition and order shall be served on the president or other head of the corporation, or on the secretary or treasurer thereof, personally, at least ten days before the time for showing cause.

Formerly L. 1890, ch. 564, § 50, as am'd by L. 1892, ch. 688.

The title of the true owner of a lost or stolen certificate of stock may be asserted against any one subsequently obtaining its possession, although the holder may be a bona fide purchaser. *Knox v. Eden Musee Co.*, 148 N. Y. 441.

One who has lost his stock certificate, and finds the company unwilling to replace it, may apply to the Supreme Court for an order to show cause why a new certificate should not be given. The court may, on the hearing, proceed summarily to hear and determine the facts, and may make an order requiring the company to issue a new certificate upon receiving a bond of indemnity. *Kinnan v. 42d St., M. & St. Nicholas Ave. R. R. Co.*, 140 N. Y. 183.

A corporation which has permitted a transfer of stock upon a forged power of attorney, and has canceled the original certificates, may be compelled to issue new certificates; and, if it has no shares which it can so issue, to pay the value thereof. *Pollock v. National Bank*, 7 N. Y. 274.

§ 68. Order of court upon such application. Upon the return of the order, with proof of due service thereof, the court shall, in a summary manner, and in such mode as it may deem advisable, inquire into the truth of the facts stated in the petition, and hear the proofs and allegations of the parties in regard thereto, and if satisfied that the petitioner is the lawful owner of the number of shares, or any part thereof, described in the petition, and that the certificate therefor has been lost or destroyed,

and can not after due diligence be found, and that no sufficient cause has been shown why a new certificate should not be issued, it shall make an order requiring the corporation, within such time as shall be therein designated, to issue and deliver to the petitioner a new certificate for the number of shares specified in the order, upon depositing such security, or filing a bond in such form and with such sureties as to the court shall appear sufficient to indemnify any person other than the petitioner who shall thereafter be found to be the lawful owner of the certificate lost or destroyed; but such provision requiring security to be deposited or bond filed is to be construed as excluding an application made by a domestic municipal corporation or by a public officer in behalf of such corporation; and the court may direct the publication of such notice, either before or after making such order as it shall deem proper. Any person claiming any rights under the certificates alleged to have been lost or destroyed shall have recourse to such indemnity, but in any application under the provisions of this chapter, in which a domestic municipal corporation or a public officer in behalf of such corporation, shall be by the foregoing provisions of this section excused from depositing security or filing a bond, such municipal corporation shall be liable for all damages that may be sustained by any person, in the same case and to the same extent as sureties to a bond or undertaking would have been, if such a bond or undertaking had been filed; and the corporation issuing such certificate shall be discharged from all liability to such person upon compliance with such order; and obedience to the order may be enforced by attachment against the officer or officers of the corporation on proof of his or their refusal to comply with it.

Formerly L. 1890, ch. 564, § 51, as re-enacted by L. 1892, ch. 688, as am'd by L. 1905, ch. 35.

§ 69. **Financial statement to stockholders.** Stockholders owning five per centum of the capital stock of any corporation other than a moneyed corporation, not exceeding one hundred thousand dollars, or three per centum where it exceeds one hundred thousand dollars, may make a written request to the treasurer or chief fiscal officer thereof, for a statement of its affairs, under oath, embracing a particular account of all its assets and liabilities, and the treasurer shall make such statement and deliver it to the person presenting the request within thirty days thereafter, and keep on file for twelve months thereafter a copy of such statement, which shall at all times during business hours be exhibited to any stockholder demanding an examination thereof; but the treasurer or such chief fiscal officer shall not be required to deliver more than one such statement in any one year. The supreme court, or any justice thereof, may upon application, for good cause shown, extend the time for making and delivering such certificate. For every neglect or refusal of the treasurer or other chief fiscal officer thereof to comply with the provisions of this section he shall forfeit and pay to the person making such request the sum of fifty dollars, and the further sum of ten dollars for every twenty-four hours thereafter until such statement shall be furnished.

Formerly L. 1890, ch. 564, § 52, as am'd by L. 1892, ch. 688.

It may be that the Supreme Court, independently of statute, by virtue of its supervisory power, has the right to order an inspection of the books of account of a corporation by a stockholder; but such an order will not be granted by the court unless it appears that the applicant is the owner of the amount of stock specified in the foregoing section, and has made a request, pursuant to statute, and that the treasurer has not within thirty days delivered such statement. *People ex rel. Clason v. Nassau Ferry Co.*, 86 Hun 128.

The furnishing by the treasurer of an unverified statement, after a demand for a statement under oath, and his refusal to furnish any other statement subjects him to the statutory penalty of fifty dollars, and the further penalty of ten dollars for every day's neglect, up to the time when an action for the penalty is begun. *St. John v. Eberlin*, 23 Misc. 585.

A detailed statement of the assets and liabilities of the corporation is sufficient; the business transactions of the corporation are not required to be stated. *French v. McMillan*, 43 Hun 188. Omission to demand sworn statement merely waives verification. *McCrea v. Bedell*, 9 Misc. 372.

§ 70. Liabilities of officers, directors and stockholders of foreign corporations. Except as otherwise provided in this chapter the officers, directors and stockholders of a foreign stock corporation transacting business in this state, except moneyed and railroad corporations, shall be liable under the provisions of this chapter, in the same manner and to the same extent as the officers, directors and stockholders of a domestic corporation, for:

1. The making of unauthorized dividends;
2. Unlawful loans to stockholders;
3. Making false certificates, reports or public notices;
4. An illegal transfer of the stock and property of such corporation, when it is insolvent or its insolvency is threatened;
5. The failure to file an annual report.

Such liabilities may be enforced in the courts of this state, in the same manner as similar liabilities imposed by law upon the officers, directors and stockholders of domestic corporations.

Formerly § 60, as added by L. 1897, ch. 384.

Former subd. 2 of this section relating to a liability for the creation of unauthorized and excessive indebtedness was repealed by the Consolidated Laws of 1909. There is no longer any liability of this nature upon officers of domestic corporations (see note to § 34) and liabilities upon officers of foreign corporations are by the terms of the section intended to be the same as domestic. Otherwise the section is re-enacted without change, except change of number from 60 to 70, and place in article changed so as to follow in logical sequence.

For other provisions affecting foreign corporations, see references thereto in the index under the heading "Foreign Corporations."

This section applies to foreign corporations in those cases only where the act complained of violates the law of the domicile of the corporation. *Hutchinson v. Stadler*, 85 App. Div. 424.

The courts of one State will not enforce the penal laws of other States, or allow a recovery for a penalty imposed upon

a corporation or its officers by the State in which the corporation was created. *Hutchinson v. Stadler*, 85 App. Div. 424, 430.

*ARTICLE 5

Laws Repealed; When to Take Effect

Section 80. Laws repealed.

81. When to take effect.

§ 80. **Laws repealed.** Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

§ 81. **When to take effect.** This chapter shall take effect immediately

Schedule of Laws Repealed

Laws of	Chapter	Section	Laws of	Chapter	Section
1814....	12....	All (38th Sess.)	1896....	932....	1, pt. adding § 58 to L. 1892, ch. 688
1825....	325....	1-3, 12	1897....	384....	All
1828....	20....	15, ¶¶ 17, 18 (2d Meet.)	1899....	354....	All
1828....	21....	1, ¶ 180 (2d Meet.)	1899....	696....	All
1830....	71....	All	1900....	128....	All
1848....	145....	All	1900....	164....	All
1853....	176....	All	1900....	476....	All
1853....	425....	All	1901....	130....	All
1853....	460....	All	1901....	354....	All
1869....	742....	7	1902....	80....	All
1875....	392....	8	1902....	98....	All
1884....	434....	All	1902....	286....	All
1889....	57....	All	1902....	601....	All
1890....	564....	All	1903....	320....	All
1892....	337....	All	1904....	123....	All
1892....	688....	All	1904....	307....	All
1893....	196....	All	1904....	706....	All
1893....	638....	All	1905....	35....	All
1893....	700....	All	1905....	415....	All
1894....	346....	All	1905....	489....	All
1896....	929....	All	1905....	745....	All
			1905....	750....	All
			1905....	751....	All
			1906....	238....	All

*CONSOLIDATORS' NOTE.—The Stock Corporation Law, as originally enacted in 1890, contained its own separate schedule of laws repealed, but upon the revision in 1892, the schedule was incorporated into the schedule of the General Corporation Law, as was that of the Business Corporation Law. This article is made necessary by change in the form of the present corporation laws to conform to the scheme of consolidation which requires each general law to have its own repealing schedule.

TAXATION OF CORPORATIONS

Laws of 1909, Chapter 62, Entitled: "An Act in Relation to Taxation, Constituting Chapter Sixty of the Consolidated Laws," as Amended to the Commencement of the Legislative Session of 1912.

LOCAL TAXATION

[The sections of the Consolidated Tax Law, published in this book, include only so much thereof as regulate the taxation of Business Corporations.]

§ 1. **Short title.** This chapter shall be known as the "Tax Law."

§ 2. **Definitions.** 1. "Tax district" as used in this chapter, means a political subdivision of the state having a board of assessors authorized to assess property therein for state and county taxes.

* * * * *

3. The terms "land," "real estate," and "real property," as used in this chapter, include the land itself above and under water, all buildings and other articles and structures, substructures and superstructures, erected upon, under or above, or affixed to the same; all wharves and piers, including the value of the right to collect wharfage, crannage or dockage thereon; all bridges, all telegraph lines, wires, poles and appurtenances; all supports and inclosures for electrical conductors and other appurtenances upon, above and under ground; all surface, underground or elevated railroads, including the value of all franchises, rights or permission to construct, maintain

or operate the same in, under, above, on or through, streets, highways or public places; all railroad structures, substructures and superstructures, tracks and the iron thereon; branches, switches and other fixtures permitted or authorized to be made, laid or placed in, upon, above or under any public or private road, street or ground; all mains, pipes and tanks laid or placed in, upon, above or under any public or private street or place for conducting steam, heat, water, oil, electricity or any property, substance or product capable of transportation or conveyance therein or that is protected thereby, including the value of all franchises, rights, authority or permission to construct, maintain or operate, in, under, above, upon, or through, any streets, highways or public places, any mains, pipes, tanks, conduits or wires, with their appurtenances, for conducting water, steam, heat, light, power, gas, oil or other substance, or electricity for telegraphic, telephonic or other purposes; all trees and underwood growing upon land, and all mines, minerals, quarries and fossils in and under the same, except mines belonging to the state. A franchise, right, authority or permission specified in this subdivision shall for the purpose of taxation be known as a "special franchise." A special franchise shall be deemed to include the value of the tangible property of a person, copartnership, association or corporation situated in, upon, under or above any street, highway, public place or public waters in connection with the special franchise. The tangible property so included shall be taxed as a part of the special franchise. No property of a municipal corporation shall be subject to a special franchise tax.

Thus am'd by L. 1899, ch. 712.

* * * * *

5. The terms "personal estate," and "personal property," as used in this chapter, include chattels, money,

things in action, debts due from solvent debtors, whether on account, contract, note, bond or mortgage; debts and obligations for the payment of money due or owing to persons residing within this state, however secured or wherever such securities shall be held; debts due by inhabitants of this state to persons not residing within the United States for the purchase of any real estate; public stocks, stocks in moneyed corporations, and such portion of the capital of incorporated companies, liable to taxation on their capital, as shall not be invested in real estate.

Source of section: L. 1851, ch. 371, § 1; L. 1883, ch. 392.

§ 3. Property liable to taxation. All real property within this state, and all personal property situated or owned within this state, is taxable unless exempt from taxation by law.

R. S., pt. 1, ch. 13, tit. 1, § 8, without change of substance.

Immunity from taxation will not be recognized unless granted in unmistakable terms. *Chicago, B. & K. C. R. R. Co. v. Guffey*, 120 U. S. 569; *Same v. Same*, 122 id. 561; *Sioux City R. R. Co. v. Sioux City*, 138 id. 98.

Exemptions from taxation, being in derogation of the sovereign authority and of common right, are not to be extended beyond the express requirements of the language used, when most rigidly construed. *Yazoo, etc., R. R. Co. v. Thomas*, 132 U. S. 174.

The general laws of the State require all property, both real and personal, except in certain cases of special exemption, to be assessed for purposes of taxation. This requirement embraces all property owned by individuals as well as corporations, and includes all shares of stock held by individuals in corporations, except in cases where the capital stock of such corporations is itself liable to taxation as against the corporation. *McMahon v. Palmer*, 102 N. Y. 176, affg. 12 Daly 362.

§ 4. Exemption from taxation. The following property shall be exempt from taxation:

* * * * *

13. A bond, mortgage, note, contract, account or other demand, belonging to any person not a resident of this state, sent to or deposited in this state for collection; the

products of another state, owned by a nonresident of this state and consigned to his agent in this state for sale on commission for the benefit of the owner; moneys of a nonresident of this state, under the control or in the possession of his agent in this state, when transmitted to such agent for the purpose of investment or otherwise.

R. S., pt. 1, ch. 13, tit. 2, § 5; R. S., pt. 1, ch. 13, tit. 5, § 3, re-enacted in part, without change of substance. See *Williams v. Supervisors of Wayne*, 78 N. Y. 561.

14. The deposits in any bank for savings which are due depositors, the accumulations in any domestic life insurance corporation, held for the exclusive benefit of the insured, other than real estate and stocks, now liable to taxation; the accumulations of any incorporated cooperative loan association upon the shares of such association held by any person; and personal property of any corporation, person, company or association transacting the business of fire, casualty or surety insurance in this state equal in value to the unearned premiums required by the laws of this state, or the regulations of its insurance department, to be charged as a liability.

L. 1857, ch. 456, § 4; Banking L. (L. 1892, ch. 689), § 191, as am'd by L. 1901, ch. 618.

* * * * *

16. The owner or holder of stock in an incorporated company liable to taxation on its capital, shall not be taxed as an individual for such stock.

R. S., pt. 1, ch. 13, tit. 1, § 7.

§ 6. No deduction allowed for indebtedness fraudulently contracted. No deduction shall be allowed in the assessment of personal property by reason of the indebtedness of the owner contracted or incurred in the purchase of nontaxable property or securities owned by him or held for his benefit, nor for or on account of any indirect liability as surety, guarantor, indorser or other-

wise, nor for or on account of any debt or liability contracted or incurred for the purpose of evading taxation.

L. 1902, ch. 202.

§ 7. When property of nonresidents is taxable. 1. Nonresidents of the state doing business in the state, either as principals or partners, shall be taxed on the capital invested in such business, as personal property, at the place where such business is carried on, to the same extent as if they were residents of the state.

2. The personal property of nonresidents of the state having an actual situs in the state, and not forming a part of capital invested in business in the state, shall be assessed in the name of the owner thereof for the purpose of identification and taxed in the tax district where such property is situated, unless exempt by law. This subdivision shall not apply to money, or negotiable collateral securities, deposited by, or debts owing to, such nonresidents nor shall it be construed as in any manner modifying or changing the law imposing a tax on real estate mortgage securities.

Subd. 1, L. 1855, ch. 37; subd. 2, added by L. 1906, ch. 248.

Application to Foreign Corporations.

The act was intended to reach the capital of non-residents employed within this State in continuous trade, and not properly sent here only for sale; so where a foreign corporation engaged in manufacturing transmitted to its agent here its product for sale, the proceeds being remitted at once, with the securities received for sales on credit, to the home office, it was not doing business in this State within the meaning of the act. *Peo. ex rel. Parker Mills Co. v. Comrs. of Taxes*, 23 N. Y. 242.

This provision applies only to the personality of foreign corporations, and not to their real estate. *Peo. ex rel. Keystone Gas Co. v. Assessors of Olean*, 15 St. Rep. 462.

It is not within the constitutional powers of the Legislature to impose upon a non-resident taxpayer a personal liability for the tax, but to impose taxes only upon property within its jurisdiction, and collection may be enforced only by a proceeding in rem. *City of New York v. McLean*, 170 N. Y. 374.

Deduction of Indebtedness.

Briefly stated, a foreign corporation is not entitled to have

deducted from the value of its property here the amount of a general indebtedness, but when a foreign corporation doing business in this State purchases property here for its business, and incurs an indebtedness for that specific property or any portion of it, the amount unpaid is to be deducted from the value of such property to ascertain the amount invested in this State. *Peo. ex rel. Hecker-Jones-Jewell Milling Co. v. Barker*, 147 N. Y. 31, limiting *Peo. ex rel. Thurber-Whyland Co. v. Barker*, 141 N. Y. 118, and reversing 86 Hun, 148.

Unless the debt of a foreign corporation, no matter how great its amount, was incurred in the acquisition of its assets within the State, such debt cannot be applied in reduction of the assessment of such assets for the purpose of taxation here. *Peo. ex rel. Dunlap's Express Co. v. Raymond*, 54 Misc. 330.

§ 11. Place of taxation of property of corporations.

The real estate of all incorporated companies liable to taxation shall be assessed in the tax district in which the same shall lie, in the same manner as the real estate of individuals. ^XAll the personal estate of every incorporated company liable to taxation on its capital shall be assessed in the tax district where the principal office or place for transacting the financial concerns of the company shall be, or if such company have no principal office, or place for transacting its financial concerns, then in the tax district where the operations of such company shall be carried on. ^XIn the case of a toll bridge, the company owning such bridge shall be assessed in the tax district in which the tolls are collected; and where the tolls of any bridge, turnpike, or canal company are collected in several tax districts, the company shall be assessed in the tax district in which the treasurer or other officer authorized to pay the last preceding dividend resides.

L. 1896, ch. 908.

Stock corporations which pay an annual tax to the Comptroller of the State as a franchise or license tax are exempt from the payment of State taxes assessed by local authorities. See § 205, post.

The principal place of business designated in its certificate of incorporation, is, as against corporation, conclusive evidence of its residence. *Peo. ex rel. Knickerbocker Press v. Barker*,

87 Hun 341; *Peo. ex rel. Edison Electric Lt. Co. v. Barker*, 91 Hun 594.

Residence of a corporation for taxation cannot be inferred from the mere place of filing its certificate of incorporation. When the law under which it was formed does not require the location of its principal office to be stated in the certificate, its residence is deemed to be where its principal place of business is actually situated. *Austen v. Hudson River Telephone Co.*, 73 Hun 96; *Austen v. Westchester Telephone Co.*, 8 Misc. 11; *Oswego Starch Factory v. Dolloway*, 21 N. Y. 454; *Conroe v. Natl. Protection Ins. Co.*, 10 How. Pr. 403; *Hubbard v. Same*, 11 id. 149.

The personal property of corporations, both domestic and foreign, is taxable at the place where the principal office within this State is located, without regard to the particular situs of the property within this State. *Peo. ex rel. Keystone Gas Co. v. Assessors of Olean*, 15 St. Rep. 461.

§ 12. Taxation of corporate stock. The capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment-roll or shall be exempt by law, together with its surplus profits or reserve funds exceeding ten per centum of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company which are taxable upon their capital stock under the laws of this state, shall be assessed at its actual value.

L. 1857, ch. 456, § 3, as revised by L. 1896, ch. 908.

Meaning of "Capital Stock."

"Capital stock," as used in the statute, means not stock held by the stockholders, but the capital owned by the corporation and paid in and used as a basis of the enterprise. *Peo. ex rel. Union Trust Co. v. Coleman*, 126 N. Y. 434; *Peo. ex rel. Trust & Deposit Co. v. Norton*, 53 App. Div. 557.

"Capital stock" means not the share stock, but the capital owned by the corporation, the fund required to be paid in and kept intact as the basis of the business enterprise. In taxing corporations, therefore, the subject of valuation and assessment is never the share stock, but always the company's capital and surplus which should be assessed at its actual value when that is known or ascertainable. *U. S. Trust Co. v. New York City*, 77 Hun 182; *Peo. ex rel. Union Trust Co. v. Coleman*, 126 N. Y. 433, *distg. Oswego Starch Co. v. Dolloway*, 21 N. Y. 449.

The market value of the shares is an erroneous basis for determining the amount of capital liable to taxation. It is the

corporate assets that are the subject of taxation. *Peo. ex rel. Bleecker St. & Fulton Ferry R. R. Co. v. Barker*, 85 Hun 210.

Exemptions and Deductions.

The provision that in assessing personal property for taxation "no deduction shall be made or allowed for or on account of any debt or liability contracted or incurred in the purchase of non-taxable property," applies to debts incurred in the purchase of imported goods not taxable by the State. *Peo. ex rel. Bijur v. Barker*, 155 N. Y. 330. Imported tobacco in original packages, which has been subjected to a duty under the United States Revenue Laws, is non-taxable property. *Id.*

Letters-patent of the United States are not subject to State or local taxation where it is found that the patent rights are owned by the corporation, even though not the original patentee. *Peo. ex rel. Edison Electric Illg. Co. v. Assessors of Brooklyn*, 156 N. Y. 417; *N. Y. & N. J. Telephone Co. v. Neff*, 15 App. Div. 13.

Capital invested in United States bonds and shares of stock owned in such other corporations as are taxed in this State may be deducted from the amount of taxable capital. *Peo. ex rel. Commonwealth Ins. Co. v. Coleman*, 112 N. Y. 565; *Peo. ex rel. Pacific Mail Steamship Co. v. Comrs. of Taxes*, 64 N. Y. 541.

A corporation cannot be taxed for the value of stock which it owns in another company where it is shown that such other company is taxed in the same city upon its own property. *Peo. ex rel. Edison Electric Illg. Co. v. Neff*, 19 App. Div. 599, *affd.*, 156 N. Y. 417.

The assessment of a domestic corporation is made after a deduction for debts, because its capital and surplus are to be assessed at their actual value, which cannot be arrived at without considering and deducting debts. *Peo. ex rel. Thurber, Whyland & Co. v. Barker*, 141 N. Y. 118.

The provision for the assessment of capital stock at its actual value under this section does not conflict with or prohibit a deduction of the company's indebtedness in determining such value. *Peo. ex rel. Cornell Steamboat Co. v. Dederick*, 161 N. Y. 195, modifying 41 App. Div. 617.

Indebtedness incurred for the purchase of the good will cannot be deducted from the value of the taxable personal property under section 6 of the Tax Law, which prohibits the deduction of indebtedness incurred in the purchase of non-taxable property, since good will, though it constitutes property, is not taxable as such for general town, county, or municipal purposes. *Peo. ex rel. Cornell Steamboat Co. v. Dederick*, 161 N. Y. 195, modifying 41 App. Div. 617.

Good will, as such, is not taxable for general town, county, or municipal purposes. *Peo. ex rel. Cornell Steamboat Co. v. Dederick*, 161 N. Y. 195, modifying 41 App. Div. 617.

Foreign Corporations.

The taxation of a foreign corporation does not apply to goods sent here for the purpose of sale, but to funds used in the prose-

cution of continuous business. When a foreign corporation with a depot and agent in New York sends its goods here for sale, its only business in this State, consisting in the making of such sales, the proceeds of which are remitted to the corporate office in another State, and when sales are made on credit, the securities are sent to the home office for collection it is not liable for a local tax on its goods in this State. *Parker Mills v. Comrs.*, 23 N. Y. 242. The rule is the same under present law. *Peo. ex rel. Armstrong Cork Co. v. Barker*, 157 N. Y. 159.

A foreign corporation, which is liable for personal sums invested in business in this State, is taxable upon credits and bills receivable which are in this State and are due the corporation for merchandise sold by it in the transaction of its business in this State. *Peo. ex rel. Yellow Pine Co. v. Barker*, 23 App. Div. 524, aff'd, 155 N. Y. 665.

A foreign corporation which has for six successive years carried on business in this State under the statutory certificate permitting it to do so, keeping in New York city a stock of goods, having there a regular bank account for expenses, fixing there the terms of sale and credit for its New York business, and making collections there for that business is taxable upon the value of such goods, the amount receivable in this State, the value of its fixtures, etc., in New York State and upon its bank balance. *Peo. ex rel. Reversible Collar Co. v. Feitner*, 31 Misc. 553.

A foreign corporation, with capital invested in a continuous business in this State and liable for local taxation, is not entitled to a general deduction of its debts from the amount of property subject to local taxation. *Peo. ex rel. Humber Co. v. Barker*, 141 N. Y. 118. But when such a corporation purchases property in this State, partly for cash and partly on credit, the company is entitled to deduct from the value of the property the amount still due. *Peo. ex rel. Hecker Milling Co. v. Barker*, 147 N. Y. 31.

§ 27. Reports of corporations. The president or other proper officer of every moneyed or stock corporation deriving an income or profit from its capital or otherwise shall, on or before June fifteenth, deliver to one of the assessors of the tax district in which the company is liable to be taxed and, if such tax district is in a county embracing a portion of the forest preserve, to the comptroller of the state, a written statement specifying:

1. The real property, if any, owned by such company, the tax district in which the same is situated and, unless a railroad corporation, the sums actually paid therefor.

2. The capital stock actually paid in and secured to be paid in, excepting therefrom the sums paid for real

property and the amount of such capital stock held by the state and by an incorporated literary or charitable institution, and

3. The tax district in which the principal office of the company is situated or in case it has no principal office, the tax district in which its operations are carried on.

Such statement shall be verified by the officer making the same to the effect that it is in all respects just and true. If such statement is not made within twenty days after the fifteenth day of June, or is insufficient, evasive or defective, the assessors may compel the corporation to make a proper statement by mandamus.

L. 1896, ch. 908.

Assessors have jurisdiction to assess a corporation that omits to make a statement of its financial condition. If such a corporation omits to appear and demand a correction of the preliminary assessment, it can obtain no relief from the overvaluation by certiorari. *Peo. ex rel. Mutual Union Tel. Co. v. Comrs. of Taxes*, 99 N. Y. 254.

§ 28. Penalty for omission to make statement. In case of neglect to furnish such statements within thirty days after the time above provided, the company so neglecting shall forfeit to the people of this state for each statement so omitted to be furnished, the sum of two hundred and fifty dollars, and it shall be the duty of the attorney-general to prosecute for such penalty upon information which shall be furnished him by the comptroller. Upon such statement being furnished and the costs of the suit being paid, the comptroller, if he shall be satisfied that such omission was not wilful, may, in his discretion, discontinue such suit.

L. 1896, ch. 908.

* * * * *

§ 32. Corporations, how assessed. The assessors shall assess corporations liable to taxation in their respective tax districts upon their assessment-rolls in the following manner:

1. In the first column the name of each corporation, and under its name the amount of its capital stock paid in and secured to be paid in; the amount paid by it for real property then owned by it wherever situated; the amount of all surplus profits or reserve funds exceeding ten per centum of its capital, after deducting therefrom the amount of said real property and the amount of its stock, if any, belonging to the state and to incorporated literary and charitable institutions.

2. In the second column the quantity of real property except special franchises owned by such corporation and situated within their tax district.

3. In the third column the actual value of such real property, except special franchises.

4. In the fourth column the amount of the capital stock paid in and secured to be paid in, and of all of such surplus profits or reserve funds as aforesaid, after deducting the sums paid out for all the real estate of the company, wherever the same may be situated, and then belonging to it, and the amount of stock, if any, belonging to the people of the state and to incorporated literary and charitable institutions.

5. In the fifth column the value of any special franchise owned by it as fixed by the state board of tax commissioners.

Formerly § 31, L. 1896, ch. 908, as am'd by L. 1899, ch. 712.

See decisions cited under section 12, ante.

* * * * *

§ 36. Notice of completion of assessment-roll. The assessors shall complete the assessment-roll on or before the first day of August, and make out a copy thereof, to be left with one of their number, and forthwith cause a notice to be conspicuously posted in three or more public places in the tax district, stating that they have completed the assessment-roll, and that a copy thereof has been left with one of their number at a specified place,

where it may be seen and examined by any person until the third Tuesday of August next following, and that on that day they will meet at a time and place specified in the notice to review their assessments. Upon application by a nonresident owner of real estate, having real estate in more than one tax district, the assessors may fix a time subsequent to the third Tuesday in August, but not later than the thirty-first day of August, for a hearing and to review their assessment. In any city the notice shall conform to the requirements of the law regulating the time, place and manner of revising assessments in such city. During the time specified in the notice the assessor with whom the roll is left shall submit it to the inspection of every person applying for that purpose.

Formerly § 35, ch. 908, L. 1896, as am'd by L. 1904, ch. 385.

§ 37. Hearing of complaints. The assessors shall meet at the time and place specified in such notice, and hear and determine all complaints in relation to such assessments brought before them, and for that purpose they may adjourn from time to time. Such complainants shall file with the assessors a statement, under oath, specifying the respect in which the assessment complained of is incorrect, which verification must be made by the person assessed or whose property is assessed, or by some person authorized to make such statement, and who has knowledge of the facts stated therein. The assessors may administer oaths, take testimony and hear proofs in regard to any such complaint and the assessment to which it relates. If not satisfied that such assessment is erroneous, they may require the person assessed, or his agent or representative, or any other person, to appear before them and be examined concerning such complaint, and to produce any papers relating to such assessment with respect to his property or his

residence for the purpose of taxation. If any such person, or his agent or representative, shall wilfully neglect or refuse to attend and be so examined, or to answer any material question put to him, such person shall not be entitled to any reduction of his assessments. Minutes of the examination of every person examined by the assessors upon the hearing of any such complaint shall be taken and filed in the office of the town or city clerk. The assessors shall, after said examination, fix the value of the property of the complainant and for that purpose may increase or diminish the assessment thereof.

Formerly § 36, ch. 908, L. 1896, revising L. 1857, ch. 176, §§ 6, 7.

§ 38. Correction and verification of tax-roll. When the assessors or a majority of them shall have completed their roll, they shall severally appear before any officer of their county authorized by law to administer oaths and shall severally make and subscribe before such officer an oath in the following form: "We, the undersigned, do severally depose and swear that we have set down in the foregoing assessment-roll all the real estate situated in the tax district in which we are assessors, according to our best information; and that, with the exception of those cases in which the value of the said real estate has been changed by reason of proof produced before us, and with the exception of those cases in which the value of any special franchise has been fixed by the state board of tax commissioners, we have estimated the value of the said real estate at the sums which a majority of the assessors have decided to be the full value thereof; and, also, that the said assessment-roll contains a true statement of the aggregate amount of the taxable personal estate of each and every person named in such roll over and above the amount of debts due from such persons, respectively, and excluding such stocks as are otherwise taxable, and such other property as is exempt by law

from taxation, at the full value thereof, according to our best judgment and belief," which oath shall be written or printed on said roll, signed by the assessors and certified by the officer.

Formerly § 37, ch. 908, L. 1896, as am'd by L. 1899, ch. 712.

§ 39. Filing of roll and notice thereof. In cities the assessment-roll when thus completed and verified shall be filed on or before September first, in the office of the city clerk, there to remain for fifteen days for public inspection. The assessors shall forthwith cause a notice to be posted conspicuously in at least three public places in the tax district and to be published in one or more newspapers, if any, published in the city, that such assessment-roll has been finally completed and stating that it has been so filed and will be open to public inspection. At the expiration of such fifteen days, the city clerk shall deliver such roll to a supervisor of the tax district embraced therein. In towns, when the assessment-roll shall have been thus completed and verified, the assessors shall make two copies thereof, one of which shall be retained by them for the use of themselves and their successors in office, and the other of which, duly certified by the said assessors to be a copy of said assessment-roll, shall, on or before the fifteenth day of September, be filed in the office of the town clerk, and shall thereupon become a public record. The assessors shall forthwith cause a notice to be posted conspicuously in at least three public places in the tax district and to be published in one or more newspapers, if any, published in the town, that such assessment-roll has been finally completed and stating that such certified copy has been so filed. The said original assessment-roll shall on or before the first day of October be delivered to a supervisor of the tax district embraced therein. Notwithstanding the provisions of this section, the board of

supervisors of any county may determine the number of copies of the town assessment-rolls of the towns of such county to be made, by whom such copies shall be made, the date when the certified copy of the town assessment-roll shall be filed in the office of the town clerk, and the date when the original assessment-roll shall be delivered to the supervisor of the town.

Formerly § 38, ch. 908, L. 1896, as am'd by L. 1901, ch. 358.

STATE TAXATION

Laws of 1909, Chapter 62, Entitled: "An Act in Relation to Taxation, Constituting Chapter Sixty of the Consolidated Laws," as Amended to the Commencement of the Legislative Session of 1912.

The sections of the Consolidated Tax Law, published in this book, include only so much thereof as regulate the taxation of Business Corporations. The following sections contain the provisions relative to the State Taxation of such corporations.

ARTICLE 9

Corporation Tax

Section 180. Organization tax.*

181. License tax on foreign corporations.†

182. Franchise tax on corporations.

*Organization Tax. § 180.

The tax prescribed by section 180 is not an annual tax, but a tax imposed upon new corporations for the privilege of organization. For the full text of this section, decisions thereunder and table showing the tax payable upon various amounts, see pages 31-34, ante.

†License Tax on Foreign Corporations. § 181.

For text of section 181 and decisions thereunder, see pages 35-38.

The tax imposed by this section is payable by foreign corporations authorized to do business within the state under the General Corporation Law, section 15, and is in addition to the annual state tax under section 182 of the tax law, and the local tax under section 7 of said law.

183. Certain corporations exempted from tax on capital stock tax.
184. Additional franchise tax on transportation and transmission corporations and associations.
185. Franchise tax on elevated railroads or surface railroads not operated by steam.‡
186. Franchise tax on water-works companies, gas companies, electric or steam heating, lighting and power companies.
187. Franchise tax on insurance corporations.‡
188. Franchise tax on trust companies.‡
189. Franchise tax on savings banks.‡
190. Purchase of state bonds; credit to be given.‡
191. Tax upon foreign bankers.‡
192. Report of corporations.
193. Value of stock to be appraised.
194. Further requirements as to reports of corporations.
195. Powers of comptroller to examine into affairs of corporations.
196. Notice of statement of tax; interest.
197. Payment of tax and penalty for failure.
198. Revision and readjustment of accounts by comptroller.
199. Review of determination of comptroller by certiorari.
200. Regulations as to such writ of certiorari.
201. Warrant for the collection of taxes.
202. Information of delinquents.
203. Action for recovery of taxes; forfeiture of charter of delinquent corporations.
204. Reports to be made by the secretary of state.
205. Exemptions from other state taxation.
206. Application of taxes.
207. Limitation of time.

§ 182. **Franchise tax on corporations.** For the privilege of doing business or exercising its corporate franchises in this state every corporation, joint-stock company or association, doing business in this state, shall pay to the state treasurer annually, in advance, an annual tax to be computed upon the basis of the amount of its capital stock, employed during the preceding year within this state, and upon each dollar of such amount. The measure of the amount of capital stock employed in this state shall be such a portion of the issued capital stock as the gross assets employed in any business within this state bear to the gross assets wherever employed in busi-

‡ Omitted; not within the scope of this book.

ness. For purposes of taxation, the capital of a corporation invested in the stock of another corporation shall be deemed to be assets located where the physical property represented by such stock is located. If the dividends upon the capital stock amount to six, or more than six per centum upon the par value of the capital stock, during any year ending with the thirty-first day of October, the tax shall be at the rate of one-quarter of a mill for each one per centum of dividends made or declared upon the par value of the capital stock during said year. If such dividend or dividends amount to less than six per centum on the par value of the capital stock, and

(1) The assets do not exceed the liabilities, exclusive of capital stock, or

(2) The average price at which such stock sold during said year did not equal or exceed its par value, or

(3) If no dividend was declared,

Then each dollar of the amount of capital stock employed in this state, determined as hereinbefore provided, shall be taxed at the rate of three-fourths of one mill. If such dividend or dividends amount to less than six per centum on the par value of the capital stock, and

(1) The assets exceed the liabilities, exclusive of capital stock, by an amount equal to or greater than the par value of the capital stock, or

(2) The average price at which such stock sold during said year is equal to or greater than the par value,

Then the amount of capital stock, determined as hereinbefore provided to be employed in this state, shall be taxed at the rate of one and one-half mills on each dollar of the valuation of the capital stock employed in this state, but such valuation shall not be less than

(1) The par value of such stock,

(2) The difference between the assets and liabilities, exclusive of capital stock,

(3) The average price at which such stock sold during said year.

If such corporation, joint-stock company or association shall have more than one kind of capital stock, and upon one of such kinds of stock a dividend or dividends amounting to six or more than six per centum upon the par value thereof, has been made or declared, and upon the other no dividend has been made or declared, or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter of a mill for each one per centum of dividends made or declared upon the capital stock upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto a tax shall be charged upon the capital stock

(1) Upon which no dividend was made or declared, or

(2) Upon which the dividend or dividends made or declared did not amount to six per centum upon the par value,

At the rate as hereinbefore provided for the taxation of capital stock upon which no dividend was made or declared, or upon which the dividend or dividends made or declared did not amount to six per centum on the par value.

All corporations not taxable under the preceding paragraphs of this section shall be taxed in an amount not less than would be produced by an assessment of one and one-half mills on each one dollar of the actual value of its capital stock, determined to be employed in this state as hereinbefore provided, or one and one-half mills upon each dollar of such capital stock at the average price at which said stock sold during the said year.

Formerly § 182, ch. 908, L. 1896, as am'd by L. 1901, ch. 558; L. 1906, ch. 474; L. 1907, ch. 734.

The last sentence was added in 1907. It was intended to supply a

method of taxing certain corporations which were not provided for in the amendatory legislation of previous years.

Source of Section.

The foregoing section is derived from L. 1880, ch. 542, § 3, as am'd by L. 1882, ch. 361, and L. 1890, ch. 522.

Nature of the Tax.

The tax imposed upon corporations under the Tax Law is a tax upon the "corporate franchise or business," and is not a tax upon property. The tax when imposed on a domestic corporation is a tax on its corporate franchises, and when imposed on a foreign corporation is a tax on its business, a distinction based on the fact that corporate franchises are only taxable within the jurisdiction which creates them, and where alone they can be said to have a situs. *Peo. ex rel. Penn. R. R. Co. v. Wemple*, 138 N. Y. 1; *Peo. v. Home Ins. Co.*, 92 N. Y. 345; *Home Ins. Co. v. People*, 134 U. S. 594; *Peo. v. Equitable Trust Co.*, 96 N. Y. 387; *Peo. ex rel. Chicago Junction Rys. & Union Stockyards Co. v. Roberts*, 154 N. Y. 1.

In respect to foreign corporations, we do not grant them their franchises, but we permit them to do business here; and, as we should not accord them superior advantages over domestic corporations, we try to impose the same rate of taxation upon them, and thus we tax them upon their business, upon the same basis and scale. *Peo. ex rel. Niagara River Hydraulic Co. v. Roberts*, 30 App. Div. 180, *affd.*, 157 N. Y. 676.

"Capital Stock." Meaning of Term.

The term "capital stock," in the Tax Law, does not mean share stock, but means the property of the corporation contributed by its stockholders or otherwise obtained by it, to the extent required by its charter. "Capital stock" and "capital" are practically the equivalent of each other when considered as a basis for a franchise tax. *Williams v. Western Union Tel. Co.*, 93 N. Y. 162; *Peo. ex rel. Commercial Cable Co. v. Morgan*, 178 N. Y. 433; *Peo. ex rel. Am. Axe & Tool Co. v. Roberts*, 82 Hun 313; *Burrall v. Bushwick R. R. Co.*, 75 N. Y. 211; *Peo. ex rel. Wiebusch & Hilger Co., Ltd. v. Roberts*, 154 N. Y. 101.

Basis of Tax on Domestic Corporations.

A domestic corporation is required to pay a tax upon its franchise and business, to be measured by the amount of its capital stock found to be employed in this State. As to foreign corporations, jurisdiction for taxing purposes is gained from the business which they do in this State, and the tax is one upon that business. *Peo. ex rel. Am. Contracting & Dredging Co. v. Wemple*, 129 N. Y. 558; *Peo. ex rel. United Verde Copper Co. v. Roberts*, 156 N. Y. 585; *Peo. ex rel. Wiebusch & Hilger Co., Ltd. v. Roberts*, 154 N. Y. 101; *Peo. ex rel. Edison Electric Lt. Co. v. Wemple*, 148 N. Y. 690; *Peo. ex rel. Edison Electric Lt. Co. v. Campbell*, 138 N. Y. 543.

Stock owned by a domestic corporation in other domestic corporations constitutes capital employed within the State, and so forms a

basis for taxation; but as to the stock in corporations in other States, it is capital employed outside of the State and cannot be considered. *Peo. ex rel. Edison Electric Lt. Co. v. Campbell*, 138 N. Y. 543; *Peo. ex rel. Edison Electric Lt. Co. v. Wemple*, 148 N. Y. 690.

Bonds issued by foreign corporations and held by a domestic corporation afford a basis of taxation. Such bonds are presumably held by a domestic corporation at its office in this State and have their situs at the domicile of the owner. *Peo. ex rel. Edison Electric Lt. Co. v. Campbell*, 138 N. Y. 543; *Peo. v. Campbell*, 88 Hun 544.

Domestic Corporation, When Taxable.

The capital of a domestic corporation in order to be liable to assessment for a franchise tax must be employed within the State. The capital of such a company is employed where it is kept and used for the purposes of the corporation. *Peo. ex rel. Edison Electric Lt. Co. v. Campbell*, 138 N. Y. 546; *Peo. ex rel. Am. Surety Co. v. Campbell*, 74 Hun. 101, *affd.* 143 N. Y. 625.

A domestic corporation, organized for manufacturing purposes, and carrying on all such operations in another State, is not exempt from tax. For purposes of taxation the average bank account here and the average value of the goods which it sends to and keeps in the State until they are sold represent the capital stock employed within the State. *Peo. ex rel. Blackington Co. v. Roberts*, 4 App. Div. 388, *affd.* 151 N. Y. 652.

There must be some property or business within the State to justify a tax. If it has no property or business within the State there is no basis upon which to compute the tax. *Peo. ex rel. Davis-Colby Co. v. Campbell*, 66 Hun 146.

Basis of Tax on Foreign Corporations.

Taxation under the act as to foreign corporations is limited to those "doing business in this State," and the tax is upon that business, to be computed upon the basis of the amount of capital employed in its business within the State. *Peo. v. Equitable Trust Co.*, 96 N. Y. 387; *Peo. ex rel. Am. Contracting & Dredging Co. v. Wemple*, 129 N. Y. 558; *Peo. ex rel. Roebbling's Sons' Co. v. Wemple*, 138 N. Y. 582; *Peo. ex rel. Chicago Junction Ry. & Union Stockyards Co. v. Roberts*, 154 N. Y. 1.

Foreign Corporations, When Taxable.

The jurisdiction to tax foreign corporations depends upon the existence of two concurring conditions, namely, that the corporation shall be "doing business" in this State, and, second, that its capital or some portion thereof shall have been "employed within this State." *Peo. ex rel. Harlan & Hollingsworth Co. v. Campbell*, 139 N. Y. 68; *Peo. ex rel. Chicago Junction Rys. & Union Stockyards Co. v. Roberts*, 154 N. Y. 1.

A foreign corporation obtaining, through brokers carrying on business in the State, orders for goods which are sent to it for approval at the home office, and when approved are filled by the transmission of the goods direct from its factory in the foreign State, is not doing business within the State of New York. *Peo. ex rel. Southern Cotton-Oil Co. v. Roberts*, 25 App. Div. 13.

Where a foreign corporation employs an agent to solicit orders in this State, but keeps no goods for sale here, and simply provides a place for the agent to receive orders and for the temporary deposit of goods, it is not liable to a franchise tax. *Lembeck & Betz Eagle Brewing Co. v. Roberts*, 22 App. Div. 282.

A foreign corporation, whose business is conducted in another State, and which transacts none in this State, but has an office here in charge of an agent, maintained merely as a convenient meeting place for its patrons for the discussion of questions preliminary to the making of contracts, the contracts being executed at the home office, cannot be regarded as employing any of its capital in this State. *Peo. ex rel. Harlan & Hollingsworth Co. v. Campbell*, 139 N. Y. 68.

A foreign corporation which solicits and obtains, through agents in this State, orders which are filled by shipping goods from its factory in another State, and which leases an office in New York city, where it keeps samples of value of \$4,000, and has a bank account of several thousand dollars, is not taxable. *Peo. ex rel. H. B. Smith Co. v. Roberts*, 27 App. Div. 455.

A corporation which maintains an office within the State in charge of an agent, for convenience of the corporation and its patrons, is not employing capital within the State. The office furniture cannot fairly be considered capital. *Peo. ex rel. Harlan & Hollingsworth Co. v. Campbell*, 139 N. Y. 68; *Peo. ex rel. Washington Mills Co. v. Roberts*, 8 App. Div. 201, *affd.*, 151 N. Y. 619; *Peo. ex rel. Chicago Junc. Rys. & Union Stockyards Co. v. Roberts*, 154 N. Y. 1; *Peo. ex rel. A. N. Kellogg Newspaper Co. v. Roberts*, 30 App. Div. 150; *Peo. ex rel. H. B. Smith Co. v. Roberts*, 27 App. Div. 455.

A foreign corporation which establishes a place for the sale of its goods within the State of New York, pays rent for the premises, employs agents and employees to conduct its business, and sells its product from such place of business, transacts business within the State. *Peo. ex rel. Parke, Davis & Co. v. Roberts*, 91 Hun 158, *affd.*, 149 N. Y. 608.

Sales made by a foreign corporation in this State from samples, the goods being delivered to the purchaser directly from the factory in another State, do not represent capital stock employed in this State. *Seth Thomas Clock Co. v. Wemple*, 133 N. Y. 323.

Good Will.

When a corporation acquires the good will of companies or individuals who never did any business within the State the amount of stock in payment for such good will does not represent taxable capital employed within the State. *Peo. ex rel. International Elevating Co. v. Miller*, 120 App. Div. 901.

The good will of a foreign corporation, acquired and built up in this State and having a market value here, where its business is carried on, is not exempt from taxation, merely because it is intangible. *Peo. ex rel. A. J. Johnson Co. v. Roberts*, 159 N. Y. 70.

If a corporation is doing business both within and without the State, the same proportion of the value of the entire good will should be taken as the amount of the tangible property employed within the State bears to the entire amount of tangible capital employed

both inside and outside the State. *Peo. ex rel. Koechl & Co. v. Morgan*, 96 App. Div. 110, *affd.*, 183 N. Y. 574.

The taxes imposed upon corporations are upon franchises, not upon property, and the fact that dividends, a portion of which are derived from securities exempt from taxation, furnish the basis for computing the tax, does not invalidate the statute. *Peo. v. Home Ins. Co.*, 92 N. Y. 328; *Home Ins. Co. v. People*, 134 U. S. 594.

Dividends.

The statutes make no distinction between dividends earned within and outside the State; therefore, a foreign corporation is properly taxed upon its capital employed within the State at the rate of dividends declared upon its stock, notwithstanding that its business in the State was without profit. *Peo. ex rel. New England Dressed Meat Co. v. Roberts*, 155 N. Y. 408.

Where the stockholders of a company pay cash into the treasury for the purpose of increasing the working capital and subsequently a part of the same is returned to them, such repayment does not constitute a dividend within the meaning of this section, for such sum did not arise from profits or earnings in the course of business. *Peo. ex rel. N. A. Trust Co. v. Knight*, 96 App. Div. 120.

Appraisal of Capital Stock.

When no dividend has been declared the franchise tax is based upon the amount of appraised capital employed within the State, and as appraised capital means the average value of the share stock, if there have been sales of the share stock during the year, it is not necessary for the Comptroller to ascertain the intrinsic or actual value of the stock in cash, unless such intrinsic value exceed the market value, as, under the statute, he is obliged to appraise it at a sum not less than the average price at which the stock sold during the year. *Peo. ex rel. Brooklyn Elevated R. R. Co. v. Roberts*, 90 Hun 537.

The basis for assessing the tax upon the capital stock employed in this State of a corporation which has paid no dividends and of whose stock there have been no sales, during the tax year, is to be arrived at by ascertaining the actual cash value of such capital stock, and such actual value is the value of its assets, after deducting its liabilities, and adding to the sum then remaining the value of the good will of the business. *Peo. ex rel. Wiebusch & Hilger Co., Ltd. v. Roberts*, 154 N. Y. 101.

In determining the value of the capital employed within the State the Comptroller is not bound by an appraisal of the stock of the corporation made by the officers thereof. *Peo. ex rel. Schwarzschild & Sulzberger Co. v. Roberts*, 11 App. Div. 449, *affd.*, 156 N. Y. 690.

United States Bonds.

It is not necessary to deduct the amount of capital which a corporation holds in United States bonds from the total amount of its capital stock, and to compute the tax only upon dividends derived from the remainder, since the tax is upon the franchise, and not upon the property. *Peo. v. Home Ins. Co.*, 92 N. Y. 328, *affd.*, in *Home Ins. Co. v. New York*, 134 U. S. 594.

Patents and Copyrights.

The capital of a corporation invested in letters patent, United States bonds or copyrights may be appraised for the purpose of ascertaining the amount of franchise tax the same as other property. *Peo. ex rel. U. S. Aluminum Printing Plate Co. v. Knight*, 174 N. Y. 475, overruling *Peo. ex rel. A. J. Johnson Co. v. Roberts*, 159 N. Y. 70.

§ 183. Certain corporations exempt from tax on capital stock. Banks, saving banks, institutions for savings, title guaranty, insurance or surety corporations, every trust company incorporated, organized or formed, under, by or pursuant to a law of this state, and any company authorized to do a trust company business, solely or in connection with any other business, under a general or special law of this state, laundering corporations, manufacturing corporations to the extent only of the capital actually employed in this state in manufacturing, and in the sale of the product of such manufacturing, mining corporations wholly engaged in mining ores within this state, agricultural and horticultural societies or associations, and corporations, joint-stock companies or associations owning or operating elevated railroads or surface railroads not operated by steam, or formed for supplying water or gas for electric or steam heating, lighting or power purposes, and liable to a tax under sections one hundred and eighty-five and one hundred and eighty-six of this chapter, shall be exempt from the payment of the taxes prescribed by section one hundred and eighty-two of this chapter. But such a laundering, manufacturing or mining corporation shall not be exempted from the payment of such tax, unless at least forty per centum of the capital stock of such corporation is invested in property in this state and used by it in its laundering, manufacturing or mining business in this state.

L. 1896, ch. 908, as am'd by L. 1897, ch. 785, and L. 1901, ch. 558, L. 1906, ch. 474.

The exemptions from annual State taxation heretofore granted to laundry and mining corporations and to manufacturing corporations

to the extent of the capital actually employed in this State in manufacturing have been retained in the foregoing section, as amended, but upon modified terms, for a new condition restricting the exemption was prescribed in the amendment of 1901, by the addition of the provision to the effect that "such a laundrying, manufacturing or mining corporation shall not be entitled to the exemption unless at least forty per centum of the capital stock of such corporation is invested in property in this State and used by it in its laundrying, manufacturing or mining business in this State."

Heating and mixing refined asphalt, oil, sand and limestone and thus producing a new and distinct substance which is used as a paving compound, a purpose for which none of the raw materials alone is of any value, constitutes manufacturing. *Peo. ex rel. Eastern Bermudez Asphalt Paving Co. v. Morgan*, 61 App. Div. 373.

The preparation of a street for the purposes of laying an asphalt pavement thereon and the placing of such pavement thereon is not a process of manufacturing. *Peo. ex rel. Syracuse Imp. Co. v. Morgan*, 59 App. Div. 302.

A corporation which makes paints by mixing dry colors manufactured by itself, with linseed oil and turpentine, and with other ingredients not manufactured by it, stirring the mixture by machinery and afterward grinding the resulting mass, none of the separate ingredients being capable of use for any of the purposes for which the mixed paint is used, is engaged in the manufacturing business. *Peo. ex rel. F. W. Devoe & C. T. Reynolds Co. v. Roberts*, 51 App. Div. 77.

Purchasing sheep, slaughtering them, pulling the wool from the hides, selling it and the hides, converting the offal into fertilizer, reducing the carcasses to a temperature which will retard decomposition, and shipping them to the place of delivery, does not constitute manufacturing. *Peo. ex rel. N. E. Dressed Meat & Wool Co. v. Roberts*, 155 N. Y. 408.

A corporation conducting a department store and employing a portion of its capital in manufacturing is entitled to a deduction to the extent of capital invested in its manufacturing business. *Peo. ex rel. Journeay & Burnham Co. v. Roberts*, 37 App. Div. 1. But under the amendment of 1901, a deduction on account of manufacturing is not to be allowed unless at least 40 per cent. of the capital of the company is thus employed.—Ed.

A corporation engaged in making and selling kindling wood produced from slabs taken in their natural state, sawed into strips and securely compressed in bundles of kiln-dried wood of a specific size and shape, is engaged in manufacturing. *Peo. ex rel. Standard Wood Co. v. Roberts*, 20 App. Div. 514.

The collection, storage, preparation for market, and transportation of ice is not a manufacture, but the production of ice by artificial means is. *Peo. v. Knickerbocker Ice Co.*, 99 N. Y. 181.

The process of manufacture is supposed to produce some new article by the application of skill and labor to the raw material. *Peo. ex rel. Union Pacific Tea Co. v. Roberts*, 145 N. Y. 375.

The business of refining crude petroleum is manufacturing. *Commonwealth v. Atlantic Refining Co.*, 2 Pa. Co. Ct. Rep. 62.

A cooper who makes barrels, hogsheads, and similar articles of

wood, such as coopers usually make, is a manufacturer. *New Orleans v. Le Blanc*, 34 La. Ann. 596.

The printing, publishing and selling of books, and job printing constitute a manufacturing business. *Peo. ex rel. Frederick A. Stokes Co. v. Roberts*, 90 Hun 533; *Press Printing Co. v. State Board of Assessors*, 51 N. J. L. 75; *Evening Journal Assn. v. State Bd. of Assessors*, 47 N. J. L. R. 36.

A domestic corporation engaged in slaughtering cattle, preparing the same and the various products thereof for market, a portion of which business is carried on in this State and a portion elsewhere, is not wholly engaged in manufacturing in New York State. *Peo. ex rel. Schwarschild & Sulzberger Co. v. Roberts*, 11 App. Div. 449, *affd.*, 156 N. Y. 690.

§ 184. Additional franchise tax on transportation and transmission corporations and associations. Every corporation and joint-stock association formed for steam surface railroad, canal, steamboat, ferry, express, navigation, pipe-line, transfer, baggage express, telegraph, telephone, palace car or sleeping car purposes, and every other transportation corporation not liable to taxation under sections one hundred and eighty-five or one hundred and eighty-six of this chapter, shall pay for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, an annual excise tax or license fee which shall be equal to five-tenths of one per centum upon its gross earnings within this state, which shall include its gross earnings from its transportation or transmission business originating and terminating within this state, but shall not include earnings derived from business of an interstate character.

L. 1896, ch. 908, as am'd by L. 1907, ch. 734.

§ 186. Franchise tax on water-works companies, gas companies, electric or steam heating, lighting and power companies. Every corporation, joint-stock company or association formed for supplying water or gas, or for electric or steam heating, lighting or power purposes, shall pay to the state for the privilege of exercising its corporate franchises or carrying on its business in such

corporate or organized capacity in the state, an annual tax which shall be five-tenths of one per centum upon its gross earnings from all sources within this state, and three per centum upon the amount of dividends declared or paid in excess of four per centum upon the actual amount of paid-up capital employed by such corporation, joint-stock company or association. The term "gross earnings" as used in this section means all receipts from the employment of capital without any deduction.

Formerly § 186, ch. 908, L. 1896, as am'd L. 1907, ch. 734.

The last sentence was added in 1907, and was apparently enacted for the purpose of authorizing the assessment of a tax to include the value of raw materials and thus avoid the effect of the decision in the case of *Peo. ex rel. Brooklyn Union Gas Co. v. Morgan*, 114 App. Div. 266, *affd.*, 195 N. Y. 616.

This section was added in 1896. Such corporations heretofore paid a capital stock tax only, based upon dividends. Section 183 exempts them from such tax and they are now subject to this tax for State purposes.

§ 192. Reports of corporations. Corporations liable to pay a tax under this article shall report as follows:

1. Corporations paying franchise tax. Every corporation, association or joint-stock company liable to pay a tax under section one hundred and eighty-two of this chapter shall, on or before November fifteenth in each year, make a written report to the comptroller of its condition at the close of its business on October thirty-first preceding, stating the amount of its authorized capital stock, the amount of stock paid in, the date and rate per centum of each dividend declared by it during the year ending with such day, the entire amount of the capital of such corporation, and the capital employed by it in this state during such year.

2. Transportation and transmission corporations. Every transportation or transmission corporation, joint-stock company or association liable to pay an additional tax under section one hundred and eighty-four of this chapter, shall also, on or before August first in each year,

make a written report to the comptroller of its condition at the close of its business on June thirtieth preceding, stating the amount of its gross earnings from all sources and the amount of its gross earnings from its transportation or transmission business originating and terminating within this state.

3. Elevated and surface railroad corporations. Every corporation, joint-stock company or association liable to pay a tax under section one hundred and eighty-five of this chapter, shall, on or before August first of each year, make a written report to the comptroller of its condition at the close of its business on June thirtieth preceding, stating the amount of its gross earnings from business done in this state, the amount of dividends of every nature declared or paid during the year ending June thirtieth, the authorized capital of the company and the amount of capital stock actually issued and outstanding.

4. Water-works, gas, electric, steam-heating, lighting and power corporations. Every corporation, joint-stock company or association liable to pay a tax under section one hundred and eighty-six of this chapter, shall, on or before December first of each year, make a written report to the comptroller of its condition at the close of its business on October thirty-first preceding, stating the amount of its gross earnings from business done in this state, the amount of dividends of every nature declared or paid during the year ending with October thirty-first, the authorized capital of the company and the amount of capital stock actually issued and outstanding.

5. Insurance corporations. Omitted.

6. Foreign bankers. Omitted.

7. Trust companies. Omitted.

8. Savings banks. Omitted.

§ 193. Value of stock to be appraised. If the dividend or dividends amount to less than six per centum on

the par value of the capital stock, or no dividend is declared, the president, treasurer or secretary of the company liable to pay a tax under the provisions of section one hundred and eighty-two of this chapter, shall, under oath, between the first and fifteenth days of November in each year, estimate and appraise the capital stock of such company at its actual value.

And shall forward the same to the comptroller with the report provided for in the last section. If the comptroller is not satisfied with the valuation so made and returned he is authorized and empowered to make a valuation thereof, and settle an account upon the valuation so made by him, and the taxes, penalties and interest to be paid the state.

L. 1896, ch. 908, as am'd by L. 1906, ch. 474; L. 1907, ch. 734.

As amended this section is restored in a measure to its condition prior to the amendment of 1906, although this new form of the section is more favorable to the corporations than the statute which governed appraisals prior to the enactment of the 1906 amendment.

§ 194. Further requirements as to reports of corporations. Every report required by this article shall have annexed thereto the affidavit of the president, vice-president, secretary or treasurer of the corporation, association or joint-stock company or of the person or one of the persons, or the members of the partnership making the same, to the effect that the statements contained therein are true. Such reports shall contain any other data, information or matter which the comptroller may require to be included therein, and he may prescribe the form in which such reports shall be made and the form of oath thereto. When so prescribed such forms shall be used in making the report. The comptroller may require at any time a further or supplemental report under this article, which shall contain information and data upon such matters as the comptroller may specify.

Formerly L. 1896, ch. 908.

Source.—L. 1881, ch. 361, § 1; L. 1881, ch. 361, § 5, as am'd by L.

1895, ch. 425; L. 1881, ch. 361, § 7; L. 1882, ch. 409, § 322, as am'd by L. 1894, ch. 196; L. 1886, ch. 679, § 2, without change of substance, except that all reports are required to be verified.

§ 195. Powers of comptroller to examine into affairs of corporations. In case any report required by any of the preceding sections of this article shall be unsatisfactory to the comptroller, or if any such report is not made as herein required, the comptroller is authorized to make an estimate of the dividends paid by such corporation and the value of the capital stock employed by it, from any such report or from any other data, and to order and state an account according to the estimate and value so made by him for the taxes, percentage and interest due the state from such corporation, association, joint-stock company, person or partnership. The comptroller shall also have power to examine or cause to be examined, in case of a failure to report or in case the report is unsatisfactory to him, the books and records of any such corporation, joint-stock association, company, foreign banker, person or partnership, and may hear testimony and take proofs material for his information, either personally or he may appoint a commissioner by a written appointment under his hand and official seal for that purpose. Every commissioner so appointed shall be authorized to make such examination and take such testimony and hear such proofs and report the proofs and testimony so taken and the result of his examination so made and the facts found by him to the comptroller. The comptroller shall, therefrom, or from any other data which shall be satisfactory to him, order and state an account for the tax due the state, together with the expenses of such examination and the taking of such testimony and proofs. Such expenses shall be fixed and adjusted by the comptroller.

Formerly § 192, ch. 908, L. 1896.

Source.—L. 1881, ch. 361; L. 1882, ch. 409, §§ 322, 323; L. 1895, ch. 196, without change of substance. The power to subpoena wit-

nesses and the punishment for contempt provided by L. 1881, ch. 361, § 13, is covered by Code Civil Procedure, § 854ff.

§ 196. Notice of statement of tax; interest. Upon auditing and stating every account for taxes or other charges under this article, the comptroller shall forthwith send notice thereof in writing to the person, partnership, company, association or corporation against whom the same is made, which notice may be mailed to the post-office address of such person, partnership, association, company or corporation. All accounts so audited and stated shall bear interest upon the total amount found due thereon to the state, for taxes, percentage, interest and other charges, from the expiration of thirty days after sending such notice until payment thereof shall be made.

Formerly § 193, ch. 908, L. 1896.

§ 197. Payment of tax and penalty for failure. A tax imposed by section one hundred and eighty-two or one hundred and eighty-six of this chapter shall be due and payable into the state treasury on or before the fifteenth day of January in each year. A tax imposed by section one hundred and eighty-four of this chapter on a transportation or transmission corporation, or by section one hundred and eighty-five, on elevated railroads or surface railroads not operated by steam, shall be due and payable into the state treasury on or before the first day of August in each year. A tax imposed by section one hundred and eighty-seven of this chapter on an insurance corporation shall be due and payable into the state treasury on or before the first day of June in each year. A tax imposed by section one hundred and eighty-eight or one hundred and eighty-nine shall be due and payable into the state treasury on or before the first day of September in each year. A tax imposed by section one hundred and ninety-one of this chapter on a foreign

banker shall be due and payable into the state treasury on or before February first in each year. If such tax in any case is not paid within thirty days after the same becomes due, or if the report of any such corporation is not made within the time required by this article, the corporation, association, joint-stock company, person or partnership, liable to pay the tax, shall pay into the state treasury, in addition to the amount of such tax, a sum equal to five per centum thereof, and one per centum additional for each month the tax remains unpaid, which sum shall be added to the tax and paid or collected therewith. Every corporation, association, joint-stock company, person or partnership failing to make the annual report required by this article, or failing to make any special report required by the comptroller, within any reasonable time to be specified by him, shall forfeit to the people of the state the sum of one hundred dollars for every such failure, and the additional sum of ten dollars for each day that such failure continues. Such tax shall be a lien upon and bind all the real and personal property of the corporation, joint-stock company or association liable to pay the same from the time when it is payable until the same is paid in full.

Formerly § 194, ch. 908, L. 1896, as am'd by L. 1901, chs. 118, 132 and 558.

Source.—L. 1881, ch. 361, §§ 4, 5, 6, 7; L. 1882, ch. 409, § 322, as am'd by L. 1895, ch. 196; L. 1886, ch. 679, § 1, as am'd by L. 1895, ch. 418. The former law in each instance imposed a penalty of 10 per centum if the tax was not paid within thirty days after it became due. This section of the revision imposes a penalty of 5 per centum if the tax is not paid within thirty days after it becomes due, and 1 per centum for each month throughout the calendar year, and interest, if not paid during such year.

For cases involving penalties for failure to make annual reports under the former statute see *Peo. ex rel. Edison El. Ill. Co. v. Wemple*, 61 Hun 53; *Peo. ex rel. Brush El. M. Co. v. Wemple*, 15 N. Y. Supp. 718; 39 St. Rep. 614, see, also, 129 N. Y. 664 and 543, cases reversed on other points.

§ 198. Revision and readjustment of accounts by comptroller. If an application be filed with the comp-

troller by the party against whom the account is stated or by the attorney-general within one year from the time any such account shall have been audited and stated, the comptroller may at any time, upon notice thereof sent to the person, partnership, company, association or corporation against whom it is stated, revise and readjust such account and if it shall be made to appear upon any such application, by evidence submitted to him or otherwise, that any such account included taxes or other charges which could not have been lawfully demanded, or that payment has been legally made or exacted of any such account, he shall resettle the same according to law and the facts, and charge or credit, as the case may require, the difference, if any, resulting from such revision or resettlement upon the accounts for taxes of or against any such person, partnership, company, association or corporation. Such credit, whether allowed before or after the passage of this chapter may be, by the person, partnership, company, association or corporation in whose favor it is allowed, assigned to a person, partnership, company, association or corporation liable to pay taxes under article nine of this chapter, and the assignee of the whole or any part of such credit on filing with the comptroller such assignment shall thereupon be entitled to credit on the books of the comptroller for the amount thereof on the current account for taxes of such assignee in the same way and with the same effect as though the credit had originally been allowed in favor of such assignee. The comptroller shall forthwith send written notice of his determination upon such application to the applicant, and to the attorney-general, which notice may be sent by mail to his post-office address.

Formerly § 195, ch. 908, L. 1896, as am'd by L. 1903, ch. 642; L. 1907, ch. 734.

Source.—L. 1881, ch. 361, § 19, as added by L. 1899, ch. 463, without substantial change, except that the readjustment must be within one year after notice of the audit of the account has been

served on the person or corporation, instead of "at any time."

In 1907 the first sentence of this section was amended so as to permit the Comptroller to revise and readjust a tax "at any time," provided the application for such revision and readjustment shall have been filed within one year from the time the tax account has been audited and stated. Prior to this amendment the Comptroller could not lawfully revise and readjust an erroneous tax after the expiration of one year, even though the application had been previously filed.

The provision for assignment of a credit was added in 1903.

The requirement that the Comptroller should send reports to the Attorney-General was added in 1903.

§ 199. Review of determination of comptroller by certiorari. The determination of the comptroller upon any application made to him by any person, partnership, company, association or corporation for a revision and resettlement of any account, as prescribed in this article, may be reviewed both upon the law and the facts upon certiorari by the supreme court at the instance of any person, partnership, company, association or corporation affected thereby, and in the name and on behalf of the people of the state. For the purpose of such review the comptroller shall return, on such certiorari, the accounts and all the evidence before him on such application, and all the papers and proofs upon the original statement of such account and all proceedings thereon. If the original or resettled accounts shall be found erroneous or illegal, either in point of law or of fact, by the supreme court, upon any such review, the accounts reviewed shall then be corrected and restated, and from any determination of the supreme court upon any such review an appeal to the court of appeals may be taken by either party.

Formerly § 196, ch. 908, L. 1896.

Source.—L. 1881, ch. 361, as am'd by L. 1889, ch. 463.

§ 200. Regulations as to such writ of certiorari. No certiorari to review any audit and statement of an account or any determination by the comptroller under this article shall be granted unless notice of application therefor is made within thirty days after the service of the

notice of such determination. Eight days' notice shall be given to the comptroller of the application for such writ. The full amount of the taxes, percentage, interest and other charges audited and stated in such account must be deposited with the state treasurer before making the application and an undertaking filed with the comptroller, in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such writ is dismissed or the determination of the comptroller affirmed, the applicant for the writ will pay all costs and charges which may accrue against him or it in the prosecution of the writ, including costs of all appeals.

Formerly § 197, ch. 908, L. 1896.

Source.—L. 1881, ch. 361, § 17, without change of substance.

The Comptroller cannot, without legislation, return to a corporation a deposit of an assessment made by it, under section 197 of the Tax Law, for the purpose of reviewing the same and which the Appellate Division subsequently declared to be illegal, as section 21 of article 3 of the State Constitution forbids it. *Matter of L. E. Waterman Co.*, 33 Misc. 569.

§ 201. Warrant for the collection of taxes. After the expiration of thirty days from the sending by the comptroller of a notice of a statement of an account as provided in this article, unless the amount of such account shall have been paid or deposited with the state treasurer, if an appeal or other proceedings have been taken to review the same, and the undertaking given as provided in this article, the comptroller may issue a warrant under his hand and official seal, directed to the sheriff of any county of the state, commanding him to levy upon and sell the real and personal property of the person, partnership, company, association or corporation against which such account is stated, found within his county for the payment of the amount thereof with interest thereon and costs of executing the warrant, and to return such warrant to the comptroller and pay

to the state treasurer the money collected by virtue thereof, by a time to be therein specified, not less than sixty days from the date of the warrant. Such warrant shall be a lien upon and shall bind the real and personal property of the person, partnership, company, association or corporation against which it is issued, from the time an actual levy shall be made by virtue thereof. The sheriff to whom any such warrant shall be directed shall proceed upon the same in all respects, with like effect, and in the same manner as prescribed by law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in executing the warrant, to be collected in the same manner.

Formerly § 108, ch. 908, L. 1896.

Source.—L. 1885, ch. 501, § 18; L. 1882, ch. 409, § 322, as am'd by L. 1894, ch. 196.

§ 202. **Information of delinquents.** It shall be the duty of any person having knowledge of the evasion of taxation under this article by any corporation, association, joint-stock company, partnership or person liable to taxation thereunder, or any omission on their part to make the reports required by this article, to make a written report thereof to the comptroller of the state, with such information as may be in his possession as may lead to the recovery of any taxes due the state therefrom. If, in his opinion, the interests of the state require it, the comptroller may employ such person to assist in the collection and preparation of evidence and in the prosecution and trial of actions for such taxes, and so much of the same, not exceeding ten per centum thereof, as may be collected from any such delinquent corporation, association, company, partnership, or person, by reason of such report and such services, as shall have been agreed upon between such person and the comptroller or attorney-general as a compensation therefor,

shall be paid to such person, and nothing shall be paid to such person for such report or services unless there shall be a recovery of taxes by reason thereof.

Formerly § 199, ch. 908, L. 1896.

Source.—L. 1886, ch. 266.

§ 203. Action for recovery of taxes; forfeiture of charter of delinquent corporation. An action may be brought by the attorney-general, at the instance of the comptroller, in the name of the state, to recover the amount of any account audited and stated by the comptroller under the provisions of this article. If any such account shall remain unpaid at the expiration of one year after notice of the statement thereof has been sent as required by this article, and the comptroller is satisfied that the failure to pay the same is intentional, he shall so report to the attorney-general, who shall immediately bring an action, in the name of the people of the state, for the forfeiture of the franchise of any corporation, joint-stock company or association failing to make such payment, and if it is found that such failure was intentional, judgment shall be rendered in such action for the forfeiture of its franchise and for its dissolution, and thereafter such franchise shall be annulled.

Formerly § 200, ch. 908, L. 1896.

Source.—L. 1881, ch. 361, § 2; L. 1882, ch. 409, § 322, as am'd by L. 1894, ch. 196; L. 1886, ch. 679, § 3.

§ 204. Reports to be made by the secretary of state. The secretary of state shall transmit on the first day of each month to the comptroller a report of the stock corporations whose certificates of incorporation are filed, or of the foreign stock corporations to whom a certificate of authority has been issued to do business in this state, during the preceding month. Such report shall state the name of the corporation, its place of business, the amount of its capital stock, its purposes or objects, the names and places of residence of its directors, and, if a foreign

corporation, its place of business within the state. The comptroller may prescribe the forms and furnish the blanks for such reports. The secretary of state shall make like reports to the comptroller whenever required by him relating to any such corporations whose certificates have been filed or to whom a certificate of authority has been issued prior to the time when this article takes effect, and during any period of time specified by the comptroller in his request for such report.

Formerly § 201, ch. 908, L. 1896.

§ 205. Exemptions from other state taxation. The personal property of every corporation, company, association or partnership, taxable under this article, other than for an organization tax, shall be exempt from assessment and taxation upon its personal property for state purposes, if all taxes due and payable under this article have been paid thereby. The personal property of every corporation taxable under section one hundred and eighty-eight of this article, other than for an organization tax, and as provided in the banking law, shall be exempt from assessment and taxation for all other purposes. The personal property of a private or individual banker, actually employed in his business as such banker, shall be exempt from taxation for state purposes, if such private or individual banker shall have paid all taxes due and payable under this article. Such corporation and private or individual banker shall in no other respect be relieved from assessment and taxation by reason of the provisions of this article. The owner and holder of stock in an incorporated trust company liable to taxation under the provisions of this chapter shall not be taxed as an individual for such stock. Personal property exempted from taxation by this section shall not include shares of stock of banks and banking associations taxable under the provisions of section twenty-four of this chapter.

Formerly § 202, ch. 908, L. 1896, as am'd by L. 1902, ch. 172; L. 1907, ch. 121.

In 1907 the words "if all taxes due and payable under this article have been paid thereby," which prior thereto had been at the end of the second sentence were transposed to the end of the first sentence.

A trust company which has paid all taxes due from it, under article 9 of the Tax Law, is not subject to local taxation upon stock owned by it in a national bank. *Guaranty Trust Co. v. New York*, 108 App. Div. 192. A tax on such stock is void, and if payment of such tax by the trust company is involuntary it may recover the amount thereof in an action for money had and received. Such a payment is involuntary where it is made by the national bank issuing the stock in question, without the knowledge of the trust company and against its will. *Id.*

§ 206. Application of taxes. The taxes imposed by this article and the revenues thereof shall be applicable to the general fund of the treasury and to the payment of all claims and demands which are a lawful charge thereon.

Formerly § 203, ch. 908, L. 1896.

§ 207. Limitation of time. The provisions of the code of civil procedure relative to the limitation of time of enforcing a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty prescribed by this article, and this section shall be construed as having been in effect as of date of the original enactment of the corporation tax law.

Formerly § 282, ch. 908, L. 1896, added by ch. 737, L. 1899.

The enactment of the foregoing section superseded the decision in *Peo. ex rel. N. Y. Loan & Impt. Co. v. Roberts*, 157 N. Y. 70.

UNITED STATES CORPORATION TAX

Provisions of the Federal Law imposing a tax upon certain corporations, constituting Section 38 of "An act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes."

In Effect August 6, 1909

* Tax upon Domestic and Foreign Corporations; how computed; certain exemptions.

§ 38. That every corporation, joint-stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State, or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock

* The sections have been given arbitrary headings as a matter of convenience.

of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska, and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed: Provided, however, That nothing in this section contained shall apply to labor, agricultural or horticultural organizations, or to fraternal beneficiary societies, orders or associations operating under the lodge system, and providing for the payment of life, sick, accident and other benefits to the members of such societies, orders, or associations, and dependents of such members, nor to domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual.

“ Net Income ” as basis of Tax, and Definition of Term.

Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint stock company or association, or insurance company, received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; (second) all losses

actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof, or imposed by the government of any foreign country as a condition to carrying on business therein; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed: Provided, That in the case of a corporation, joint stock company or association or insurance company, organized under the laws of a foreign country, such net income shall be ascertained by deducting from the gross amount of its income received within the year from business transacted and capital invested within the United States and any of its territories, Alaska, and the District of Columbia (first), all the ordinary and necessary expenses actually paid within the year out of earnings in the maintenance and operation of its business and property within the United States and its Territories, Alaska and the District of Columbia, including all charges such as rentals or franchise payments required to be made as

a condition to the continued use or possession of property; (second) all losses actually sustained within the year in business conducted by it within the United States or its Territories, Alaska, or the District of Columbia, not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness, not exceeding the proportion of its paid-up capital stock outstanding at the close of the year which the gross amount of its income for the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia bears to the gross amount of its income derived from all sources within and without the United States; (fourth) the sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, and insurance companies, subject to the tax hereby imposed. In the case of assessment insurance companies the actual deposit of sums with State or Territorial officers, pursuant to law, as additions to guaranty or reserve funds, shall be treated as being payments required by law to reserve funds.

\$5,000 may be deducted from amount of "net income;" report to internal revenue collector and form thereof.

Third. There shall be deducted from the amount of the net income of each of such corporations, joint stock

companies, or associations, or insurance companies ascertained as provided in the foregoing paragraphs of this section, the sum of five thousand dollars, and said tax shall be computed upon the remainder of said net income of such corporation, joint stock company or association, or insurance company, for the year ending December thirty-first, nineteen hundred and nine, and for each calendar year thereafter; and on or before the first day of March, nineteen hundred and ten, and the first day of March in each year thereafter, a true and accurate return under oath or affirmation of its president, vice-president, or other principal officer, and its treasurer or assistant treasurer, shall be made by each of the corporations, joint stock companies or associations, and insurance companies, subject to the tax imposed by this section, to the collector of internal revenue for the district in which such corporation, joint stock company or association, or insurance company, has its principal place of business, or, in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, in the place where its principal business is carried on within the United States, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth (first) the total amount of the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year; (second) the total amount of the bonded and other indebtedness of such corporation, joint stock company or association, or insurance company at the close of the year; (third) the gross amount of the income of such corporation, joint stock company or association, or insurance company, received during such year from all sources, and if organized under the laws of a foreign country the gross amount of its income received

within the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia; also the amount received by such corporation, joint stock company or association, or insurance company, within the year by way of dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed by this section; (fourth) the total amount of all the ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of the business and properties of such corporation, joint stock company or association, or insurance company, within the year, stating separately all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property, and if organized under the laws of a foreign country the amount so paid in the maintenance and operation of its business within the United States and its Territories, Alaska, and the District of Columbia; (fifth) the total amount of all losses actually sustained during the year and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; and in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, all losses actually sustained by it during the year in business conducted by it within the United States or its Territories, Alaska, and the District of Columbia, not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in the case of insurance companies the sums other than divi-

dends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve fund; (sixth) the amount of interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, stating separately all interest paid by it within the year on deposits; or in case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, interest so paid on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the proportion of its paid-up capital stock outstanding at the close of the year, which the gross amount of its income for the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia, bears to the gross amount of its income derived from all sources within and without the United States; (seventh) the amount paid by it within the year for taxes imposed under the authority of the United States or any State or Territory thereof, and separately the amount so paid by it for taxes imposed by the government of any foreign country as a condition to carrying on business therein; (eighth) the net income of such corporation, joint stock company or association, or insurance company, after making the deductions in this section authorized. All such returns shall as received be transmitted forthwith by the collector to the Commissioner of Internal Revenue.

Incorrect or Defective Report and Power to Examine Books and Accounts.

Fourth. Whenever evidence shall be produced before the Commissioner of Internal Revenue which in the opinion of the commissioner justifies the belief that the return made by any corporation, joint stock company or association, or insurance company, is incorrect, or whenever any collector shall report to the Commissioner of Internal Revenue that any corporation, joint stock company or association, or insurance company, has failed to make a return as required by law, the Commissioner of Internal Revenue may require from the corporation, joint stock company or association, or insurance company making such return, such further information with reference to its capital income, losses, and expenditures as he may deem expedient; and the Commissioner of Internal Revenue, for the purpose of ascertaining the correctness of such return or for the purpose of making a return where none has been made, is hereby authorized by any regularly appointed revenue agent specially designated by him for that purpose, to examine any books and papers bearing upon the matters required to be included in the return of such corporation, joint stock company or association, or insurance company, and to require the attendance of any officer or employee of such corporation, joint stock company or association, or insurance company, and to take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons; and the Commissioner of Internal Revenue may also invoke the aid of any court of the United States having jurisdiction to require the attendance of such officers or employees and the production of such books and papers. Upon the information so acquired the Commissioner of Internal

Revenue may amend any return or make a return where none has been made. All proceedings taken by the Commissioner of Internal Revenue under the provisions of this section shall be subject to the approval of the Secretary of the Treasury.

Penalties for False Report, Neglect to Make Same and for Non-Payment of Tax.

Fifth. All returns shall be retained by the Commissioner of Internal Revenue, who shall make assessments thereon; and in case of any return made with false or fraudulent intent, he shall add one hundred per centum of such tax, and in case of a refusal or neglect to make a return or to verify the same as aforesaid he shall add fifty per centum of such tax. In case of neglect occasioned by the sickness or absence of an officer of such corporation, joint stock company or association, or insurance company, required to make said return, or for other sufficient reason, the collector may allow such further time for making and delivering such return as he may deem necessary, not exceeding thirty days. The amount so added to the tax shall be collected at the same time and in the same manner as the tax originally assessed unless the refusal, neglect, or falsity is discovered after the date for payment of said taxes, in which case the amount so added shall be paid by the delinquent corporation, joint stock company or association, or insurance company, immediately upon notice given by the collector. All assessments shall be made and the several corporations, joint stock companies or associations, or insurance companies, shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, except in cases of refusal or neglect to make such return, and in cases of

false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time, within three years after said return is due, make a return upon information obtained as above provided for, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such corporation, joint stock company or association, or insurance company, immediately upon notification of the amount of such assessment; and to any sum or sums due and unpaid after the thirtieth day of June in any year, and for ten days after notice and demand thereof by the collector, there shall be added the sum of five per centum on the amount of tax unpaid and interest at the rate of one per centum per month upon said tax from the time the same becomes due.

Returns; where filed; Right to Inspect.

Sixth. When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such.

Officials not to Divulge Information.

Seventh. It shall be unlawful for any collector, deputy collector, agent, clerk or other officer or employee of the United States to divulge or make known in any manner whatever not provided by law to any person any information obtained by him in the discharge of his official duty, or to divulge or make known in any manner not provided by law any document received, evidence taken, or report made under this section except upon the special direction of the President; and any offense against

the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or both, at the discretion of the court.

False or Fraudulent Reports; Violations of Act a Misdemeanor; Jurisdiction of Circuit Courts.

Eighth. If any of the corporations, joint stock companies or associations, or insurance companies, aforesaid, shall refuse or neglect to make a return at the time or times hereinbefore specified in each year, or shall render a false or fraudulent return, such corporation, joint stock company or association, or insurance company, shall be liable to a penalty of not less than one thousand dollars and not exceeding ten thousand dollars.

Any person authorized by law to make, render, sign, or verify any return who makes any false or fraudulent return, or statement, with intent to defeat or evade the assessment required by this section to be made, shall be guilty of a misdemeanor, and shall be fined not exceeding one thousand dollars or be imprisoned not exceeding one year, or both, at the discretion of the court, with the costs of prosecution.

All laws relating to the collection, remission, and refund of internal revenue taxes, so far as applicable to and not inconsistent with the provisions of this section, are hereby extended and made applicable to the tax imposed by this section.

Jurisdiction is hereby conferred upon the circuit and district courts of the United States for the district within which any person summoned under this section to appear to testify or to produce books, as aforesaid, shall reside, to compel such attendance, production of books, and testimony by appropriate process.

PENAL LAW PROVISIONS

Laws of 1909, Chapter 88, Entitled: "An Act for the Punishment of Crime, Constituting Chapter Forty of the Consolidated Laws," as Amended to the Commencement of the Legislative Session of 1912.

Numerical Arrangement of Sections Relating to Business Corporations

- Section 280. Corporations not to practice law.
440. Conducting business under assumed name.
660. Frauds in the organization of corporations.
661. Frauds in procuring organization of corporations.
662. Fraudulent issue of stocks and bonds.
663. Acting for foreign corporations not authorized to do business in this State.
664. Misconduct of officers and directors of stock corporations.
665. Misconduct of directors, officers, agents and employees of corporations.
666. Unlawful use of certain titles in connection with corporate name.
667. Presumption of knowledge of corporate condition and business and of assent thereto by directors; definitions.
668. Misconduct at corporate elections.
669. Misconduct of officers and agents of pipe-line corporations.
759. Refusal to permit employees to attend election.
890. Officer of corporation selling fraudulent shares.
926. False rumors as to stocks, bonds or public funds.
1271. Hours of labor to be required.
1272. Payment of wages.

§ 280. Corporations not to practice law.

[This section is printed in its entirety in the Business Corporations Law, at pages 12 and 13, ante.]

§ 440. Conducting business under assumed name. 1. No person or persons shall hereafter carry on or conduct or transact business in this state under any assumed name or under any designation, name or style, corporate or otherwise, other than the real name or names of the individual or individuals conducting or transacting such business, unless such person or persons shall file in the office of the clerk of the country or counties in which such person or persons conduct, or transact or intend to conduct or transact such business, a certificate setting forth the name under which such business is, or is to be, conducted or transacted, and the true or real full name or names of the person or persons conducting or transacting the same, with the post-office address or addresses of said person or persons. Said certificate shall be executed and duly acknowledged by the person or persons so conducting, or intending to conduct such business.

2. Persons conducting such business under an assumed name, or under any such designation referred to in subdivision one, on September first, nineteen hundred, shall file such certificate as hereinbefore prescribed, within thirty days after that date, and persons thereafter conducting or transacting business as aforesaid shall, before commencing said business, file such certificate in the manner hereinbefore prescribed.

3. The several county clerks of this state shall keep an alphabetical index of all persons filing certificates, provided for herein, and for the indexing and filing of such certificates, they shall receive a fee of twenty-five cents. A copy of such certificate duly certified to by the county clerk in whose office the same shall be filed shall be presumptive evidence in all courts of law in this state of the facts therein contained.

4. This section shall in no way affect or apply to any corporation duly organized under the laws of this state,

or to any corporation organized under the laws of any other state and lawfully doing business in this state, nor shall this section be deemed or construed to prevent the lawful use of partnership name or designation, provided that such partnership name or designation shall include the true or real name of at least one of such persons transacting such business.

5. Any person or persons carrying on, conducting or transacting business as aforesaid, who shall fail to comply with the provisions of this section shall be guilty of a misdemeanor.

Formerly Penal Code, § 363-b, added by L. 1900, ch. 216.

§ 660. Frauds in the organization of corporations. A person who:

1. Without authority subscribes the name of another to or inserts the name of another in any prospectus, circular or other advertisement or announcement of any corporation or joint-stock association existing or intended to be formed, with intent to permit the same to be published, and thereby to lead persons to believe that the person whose name is so subscribed is an officer, agent, member or promoter of such corporation or association; or,

2. Signs the name of a fictitious person to any subscription for or agreement to take stock in any corporation, existing or proposed; or,

3. Signs to any such subscription or agreement the name of any person, knowing that such person does not intend in good faith to comply with the terms thereof, or under any understanding or agreement, that the terms of such subscription or agreement are not to be complied with or enforced,

Is guilty of a misdemeanor.

Formerly Penal Code, § 590, as am'd by L. 1892, ch. 692.

§ 661. Frauds in procuring organization of corporations. An officer, agent or clerk of a corporation, or of persons proposing to organize a corporation, or to increase the capital stock of a corporation, who knowingly exhibits a false, forged or altered book, paper, voucher, security or other instrument of evidence to any public officer or board authorized by law to examine the organization of such corporation, or to investigate its affairs, or to allow an increase of its capital, with intent to deceive such officer or board in respect thereto, is punishable by imprisonment in a state prison not exceeding ten years.

Formerly Penal Code, § 592, as am'd by L. 1892, ch. 662.

§ 662. Fraudulent issue of stocks and bonds. An officer, agent or other person in the service of any joint-stock company or corporation formed or existing under the laws of this state, or of the United States or of any state or territory thereof, or of any foreign government or country, who wilfully and knowingly, with intent to defraud:

1. Sells, pledges or issues, or causes to be sold, pledged or issued, or signs or executes, or causes to be signed or executed with intent to sell, pledge or issue, or causes to be sold, pledged or issued, any certificate or instrument purporting to be a certificate or evidence of the ownership of any share or shares of such company or corporation, or any bond or evidence of debt, or writing purporting to be a bond or evidence of debt of such company or corporation, without being first thereto duly authorized by such company or corporation, or contrary to the charter or laws under which such corporation or company exists, or in excess of the power of such company or corporation or of the limit imposed by law or otherwise upon its power to create or issue stock or evidences of debt; or,

2. Reissues, sells, pledges or disposes of, or causes to be reissued, sold, pledged or disposed of, any surrendered or canceled certificates, or other evidence of the transfer or ownership of any such share or shares,

Is punishable by imprisonment for a term not exceeding seven years, or by a fine not exceeding three thousand dollars, or by both.

Formerly Penal Code, § 591, as am'd by L. 1892, ch. 662.

§ 663. Acting for foreign corporations not authorized to do business in this state. Any person, or corporation, who:

1. Acts as agent or representative of any mortgage, loan or investment corporation or building and mutual loan corporation or association or co-operative savings and loan association organized outside of this state, while such mortgage, loan or investment corporation or building and mutual loan corporation or association or co-operative savings and loan association shall not be authorized under a license of the superintendent of banks to do business in this state; or,

2. Acts as agent or representative in this state of a foreign corporation, other than a moneyed corporation, with the words "trust," "bank," "banking," "insurance," "assurance," "indemnity," "guarantee," "guaranty," "savings," "investment," "loan," "benefit," or any other words or terms indicating, representing or holding out such company to be a moneyed corporation as a part of its name or corporate title, or who, in connection with such corporation or otherwise, shall put forth any sign containing said name, or who shall advertise or publish the said company as doing business in this state, directly or indirectly, through agents or otherwise, while such company shall not be authorized under a certificate procured from the secretary of state pursuant to section fifteen of the general corporation law to do business in this state,

Is guilty of a misdemeanor.

Formerly Penal Code, § 593, as am'd by L. 1892, ch. 692; L. 1904, ch. 489.

§ 664. Misconduct of officers and directors of stock corporations. A director of a stock corporation, who concurs in any vote or act of the directors of such corporation, or any of them, by which it is intended:

1. To make a dividend, except from the surplus profits arising from the business of the corporation, and in the cases and manner allowed by law; or,

2. To divide, withdraw, or in any manner pay to the stockholders, or any of them, any part of the capital stock of the corporation; or to reduce such capital stock without the consent of the legislature; or,

3. To discount or receive any note or other evidence of debt in payment of an instalment of capital stock actually called in, and required to be paid, or with intent to provide the means of making such payment; or,

4. To receive or discount any note or other evidence of debt with intent to enable any stockholder to withdraw any part of the money paid in by him on his stock; or,

5. To apply any portion of the funds of such corporation, except surplus profits, directly or indirectly, to the purchase of shares of its own stock,

Is guilty of a misdemeanor.

An officer or director of a stock corporation who:

6. Issues, participates in issuing, or concurs in a vote to issue any increase of its capital stock beyond the amount of the capital stock thereof, duly authorized by or in pursuance of law; or,

7. Sells, or agrees to sell, or is directly or indirectly interested in the sale of any share of stock of such corporation, or in any agreement to sell the same, unless at the time of such sale or agreement he is an actual owner of such share,

Is guilty of a misdemeanor, punishable by imprisonment for not less than six months, or by a fine not exceeding five thousand dollars, or by both.

Formerly Penal Code, §§ 594 and 610, as am'd by L. 1892, ch. 692.

§ 665. Misconduct of directors, officers, agents and employees of corporations. A director, officer, agent or employee of any corporation or joint-stock association who:

1. Knowingly receives or possesses himself of any of its property otherwise than in payment for a just demand, and with intent to defraud, omits to make or to cause or direct to be made a full and true entry thereof in its books and accounts; or,

2. Makes or concurs in making any false entry, or concurs in omitting to make any material entry in its books or accounts; or,

3. Knowingly (a), concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition containing any material statement which is false, or (b), omits or concurs in omitting any statement required by law to be contained therein; or,

4. Having the custody or control of its books, wilfully refuses or neglects to make any proper entry in the stock book of such corporation as required by law, or to exhibit or allow the same to be inspected, and extracts to be taken therefrom by any person entitled by law to inspect the same, or take extracts therefrom; or,

5. If a notice of an application for an injunction affecting the property or business of such joint-stock association or corporation is served upon him, omits to disclose the fact of such service and the time and place of such application to the other directors, officers and managers thereof; or,

6. Refuses or neglects to make any report or statement lawfully required by a public officer,

Is guilty of a misdemeanor.

Formerly Penal Code, § 611, as am'd by L. 1892, ch. 692; L. 1893, ch. 692; L. 1906, ch. 286.

§ 666. Unlawful use of certain titles in connection with corporate name. Any person, association or corporation, other than a moneyed corporation, who shall within this state directly or indirectly, or through agents or representatives transact business under, or in anywise use a corporate name or a corporate title with the words "trust," "bank," "banking," "insurance," "assurance," "indemnity," "guarantee," "guaranty," "savings," "investment," "loan," "benefit," as a part of such name or title, is guilty of a misdemeanor; provided, however, that any domestic corporation, other than a moneyed corporation, heretofore duly organized and heretofore duly authorized by law to use and on April twenty-ninth, nineteen hundred and four, lawfully using either or any of such words as a part of its lawful corporate title, may lawfully continue to use such corporate title, provided and if it, being a corporation other than a moneyed corporation, shall, wherever the name shall be printed, written, engraved or displayed, add, in legible English characters, of substantially the same size and style as the name, directly under the said name or immediately in connection therewith, wherever so used, the words "not a moneyed corporation."

Formerly Penal Code, § 608, added by L. 1904, ch. 489.

§ 667. Presumption of knowledge of corporate condition and business and of assent thereto by directors; definitions. It is no defense to a prosecution for a violation of the provisions of this article and article twenty-six, that the corporation is a foreign corporation, if it carries on business or keeps an office therefor in this state.

The term "director" as used in this article and article

twenty-six includes any of the persons having, by law, the direction or management of the affairs of a corporation, by whatever name described.

A director of a corporation or joint-stock association is deemed to have such a knowledge of the affairs of the corporation or association as to enable him to determine whether any act, proceeding or omission of its directors is a violation of this article and article twenty-six. If present at a meeting of the directors at which any act, proceeding or omission of such directors in violation of this article and article twenty-six occurs, he must be deemed to have concurred therein, unless he at the time causes or in writing requires his dissent therefrom to be entered on the minutes of the directors. If absent from such meeting, he must be deemed to have concurred in any such violation, if the facts constituting such violation appear on the record or minutes of the proceedings of the board of directors, and he remains a director of the corporation for six months thereafter without causing or in writing requiring his dissent from such violation to be entered on such record of minutes.

Formerly Penal Code, § 614, as am'd by L. 1892, ch. 692.

§ 668. Misconduct at corporate elections. Any person who:

1. Being entitled to vote at any meeting of the stockholders or bondholders or both of a stock corporation, sells his vote, or who issues a proxy to vote to any person for any sum of money or thing of value, except as expressly authorized by law; or,

2. Acts as an inspector of election at any such meeting and violates an oath taken by him in pursuance of law as such inspector, or violates the provisions of an oath required by law to be taken by him as such inspector, or is guilty of any dishonest or corrupt conduct as such inspector,

Is guilty of a misdemeanor.

Formerly Penal Code, § 613, as am'd by L. 1892, ch. 692; L. 1901, ch. 588.

§ 669. Misconduct of officers and agents of pipe-line corporations. Any officer, agent or manager of a pipe-line corporation who:

1. Neglects or refuses to transport any product delivered for transportation, or to accept and allow a delivery thereof in the order of application, according to the general rules of the corporation, as provided by law; or,

2. Charges, accepts or agrees to accept for such receipt, transportation and delivery, a sum different from the amount fixed by such regulations; or,

3. Allows or pays, or agrees to allow or pay, or suffers to be allowed or paid or repaid, any draw-back, rebate or allowance, so that any person shall, by any device, have or procure any transportation of products over such pipe-line at a less rate or charge than is fixed in such regulations,

Is guilty of a misdemeanor, punishable by a fine not exceeding one thousand dollars, or by imprisonment not exceeding six months, or by both.

Formerly Penal Code 612, as am'd by L. 1892, ch. 692.

§ 759. Refusal to permit employees to attend election. A person or corporation who refuses to an employee entitled to vote at an election or town meeting, the privilege of attending thereat, as provided by the election law, or subjects such employee to a penalty or reduction of wages because of the exercise of such privilege, is guilty of a misdemeanor.

Formerly Penal Code, § 41f, added by L. 1890, ch. 94, am'd by L. 1892, ch. 693.

§ 890. Officer of corporation selling fraudulent shares. An officer, agent or other person employed by any company or corporation existing under the laws of this state, or of any other state or territory of the United States,

or of any foreign government, who wilfully and with a design to defraud, sells, pledges or issues, or causes to be sold, pledged or issued, or signs or procures to be signed with intent to sell, pledge or issue, or to be sold, pledged or issued, a false, forged or fraudulent paper, writing or instrument, being or purporting to be a scrip, certificate or other evidence of the ownership or transfer of any share or shares of the capital stock of such company or corporation, or a bond or other evidence of debt of such company or corporation, or a certificate or other evidence of the ownership or of the transfer of any such bond or other evidence of debt, is guilty of forgery in the third degree, and upon conviction, in addition to the punishment prescribed in section eight hundred and ninety-three of this chapter for that offense, may also be sentenced to pay a fine not exceeding three thousand dollars.

Formerly Penal Code, § 518.

§ 926. False rumors as to stocks, bonds or public funds. A person, who, with intent to affect the market price of the public funds of this state or of the United States, or by any state or territory thereof, or of a foreign country or government, or of the stocks, bonds, or other evidences of debt of a corporation or association, or the market price of gold or silver coin or bullion, or any merchandise or commodity whatever:

1. Without lawful authority, falsely signs the name of an officer of a corporation, or of any other person to a letter, message, or other paper; or,
2. Utters or circulates such a letter, message, or paper, knowing that the same has been so falsely signed; or,
3. Knowingly circulates any false statement, rumor, or intelligence,

Is punishable by a fine of not more than five thousand dollars, or by imprisonment for not more than three years, or both.

Formerly Penal Code, § 435.

§ 1271. Hours of labor to be required. Any person or corporation:

1. Who, contracting with the state or a municipal corporation, shall require more than eight hours' work for a day's labor; or,

2. Who shall require more than ten hours' labor, including one-half hour for dinner, to be performed within twelve consecutive hours, by the employees of a street surface or elevated railway owned or operated by corporations whose main line of travel or routes lie principally within the corporate limits of cities of more than one hundred thousand inhabitants; or,

3. Who shall require the employees of a corporation owning or operating a brickyard to work contrary to the requirements of section five of the labor law; or,

4. Who shall require or permit any employee engaged in or connected with the movement of any train of a corporation operating a line of railroad of thirty miles in length, or over, in whole or in part within this state, to remain on duty more than sixteen consecutive hours; or to require or permit any such employee who has been on duty sixteen consecutive hours to go on duty without having had at least ten hours off duty; or to require or permit any such employee who has been on duty sixteen hours in the aggregate in any twenty-four hour period, to continue on duty or to go on duty without having had at least eight hours off duty within such twenty-four hour period; except when by casualty occurring after such employee has started on his trip, or by unknown casualty occurring before he started on his trip, and except when by accident or unexpected delay of trains scheduled to make connection with the train on which such employee is serving, he is prevented from reaching his terminal;

Is guilty of a misdemeanor, and on conviction therefor

shall be punished by a fine of not less than five hundred nor more than one thousand dollars for each offense.

If any contractor with the state or a municipal corporation shall require more than eight hours for a day's labor, upon conviction therefor in addition to such fine, the contract shall be forfeited at the option of the municipal corporation.

Formerly Penal Code, § 384h, added by L. 1897, ch. 416, am'd by L. 1907, ch. 506.

§ 1272. Payment of wages. A corporation or joint stock association or person carrying on the business thereof, by lease or otherwise, who does not pay the wages of all his employees in accordance with the provisions of the labor law, is guilty of a misdemeanor, and upon conviction therefor, shall be fined not less than one hundred nor more than ten thousand dollars for each offense. An indictment of a person or corporation operating a steam surface railroad for an offense specified in this section may be found and tried in any county within the state in which such railroad ran at the time of such offense.

L. 1909, ch. 88 (Consolidated Laws, ch. 40), as am'd by L. 1909, ch. 205. Formerly Penal Code, § 384i, added by L. 1897, ch. 416, § 3.

§ 1932. Punishment of corporation convicted of felony. In all cases where a corporation is convicted of an offense for the commission of which a natural person would be punishable with imprisonment, as for a felony, such corporation is punishable by a fine of not more than five thousand dollars.

CODE OF CIVIL PROCEDURE

Sections of the Code of Civil Procedure Relating to Business Corporations, Arranged in Numerical Sequence

§ 431. Summons, personal service of upon a domestic corporation. Personal service of the summons upon a defendant, being a domestic corporation, must be made by delivering a copy thereof, within the State, as follows:

1. If the action is against the mayor, alderman, [aldermen] and commonalty of the city of New York, to the mayor, comptroller, or counsel to the corporation.

2. If the action is against any other city, to the mayor, treasurer, counsel, attorney, or clerk; or, if the city lacks either of those officers, to the officer performing corresponding functions, under another name.

3. In any other case, to the president or other head of the corporation, the secretary or clerk to the corporation, the cashier, the treasurer, or a director or managing agent.

For provisions relative to service of process upon foreign corporations, see pages 27-39, ante.

It is very apparent, from the description in the statute of the persons upon whom service might be made, that the Legislature intended to facilitate such service, and only required that the person to be served should sustain such responsible and representative relations to the corporation as would secure notice to it of the commencement of the action. *Barrett v. American Telephone & Telegraph Co.*, 138 N. Y. 491.

Service of summons upon the vice-president of a domestic corporation, or upon one who performs corresponding duties under a different appellation, is a sufficient service upon the corporation. *Balmford v. Grand Lodge A. O. U. W.*, 16 Misc. 4; see, also, cases therein cited.

Service of summons on the president de facto of a defendant corporation gives the court jurisdiction of such corporation. *Stillman v. Associated Lace Makers' Co.*, 14 Misc. 503.

Service upon one who was known to be the president of a

corporation, but who had, in fact, previously resigned his office, and at the time of service had no connection with the company, is not service upon such corporation. *Buchanan v. Prospect Park Hotel Co.*, 14 Misc. 435; *Yorkville Bank v. Zeltner Brew. Co.*, 80 App. Div. 578, appeal dismissed, 178 N. Y. 572.

A managing agent, upon whom service of process may be made, does not cease to be such by the appointment of temporary receivers of the company and his retention in office by them, so long as his original appointment is not revoked by the company. *Faltiska v. N. Y., L. E. & W. R. R. Co.*, 12 Misc. 478.

The cashier of a company is its financial agent who has charge of its funds and has a right to said funds to the exclusion of any other person. *Eisenhofer v. N. Y. Zeitung Pub. Co.*, 91 App. Div. 94.

Service of Summons upon a Foreign Corporation.

For the statutes on this subject and notes relative thereto, see pages 92-95, ante.

§ 438. Summons, service of by publication. An order, directing the service of a summons upon a defendant, without the State, or by publication, may be made in either of the following cases:

1. Where the defendant to be served is a foreign corporation; or, is an unincorporated association consisting of seven or more persons, having a president and treasurer, neither of whom is a resident of this state;

* * * * *

6. Where the defendant is a resident of the State, or a domestic corporation; and an attempt was made to commence the action against the defendant, as required in chapter fourth of this act, before the expiration of the limitation applicable thereto as fixed in that chapter; and the limitation would have expired, within sixty days next preceding the application, if time had not been extended by the attempt to commence the action.

7. Where the action is against the stockholders of a corporation, or joint-stock company, and is authorized by a law of the State, and the defendant is a stockholder thereof.

* * * * *

Thus am'd by L. 1899, ch. 301, and L. 1909, ch. 492.

§ 439. Order for publication; papers to procure. The order must be founded upon a verified complaint, showing a sufficient cause of action against the defendant to be served, and proof by affidavit of the additional facts required by the last section; and also, where the application is made upon the ground that the defendant is a foreign corporation, or not a resident of the State, or in a case specified in subdivision fourth, fifth, or seventh of the last section, that the plaintiff has been or will be unable, with due diligence, to make personal service of the summons.

For other provisions relative to service by publication, see the Code of Civil Procedure, §§ 440-445.

§ 525. Verification of pleadings by corporations. The verification must be made by the affidavit of the party, or, if there are two or more parties united in interest, and pleading together, by at least one of them, who is acquainted with the facts, except as follows:

1. Where the party is a domestic corporation, the verification must be made by an officer thereof.

* * * * *

3. Where the party is a foreign corporation; or where the party is not within the county where the attorney resides, or if the latter is not a resident of the State, the county where he has his office, and capable of making the affidavit; or, if there are two or more parties united in interest, and pleading together, where neither of them, acquainted with the facts, is within that county, and capable of making the affidavit; or where the action or defense is founded upon a written instrument for the payment of money only, which is in the possession of the agent or the attorney; or where all the material allegations of the pleading are within the personal knowledge of the agent or the attorney; in either case, the verifica-

tion may be made by the agent of or the attorney for the party.

A director of a domestic corporation is an officer and may verify a pleading. *Eastham v. York State Tel. Co.*, 86 App. Div. 563.

§ 610. Injunction against corporations, service of. The injunction order must briefly recite the grounds for the injunction. Where it is granted by the court, it must be served by delivering a certified copy thereof; where it is granted by a judge, it must be served by showing the original order, and delivering a copy thereof. Service of the order, upon a corporation, may be made as prescribed in this act, for making personal service of a summons upon a corporation. Copies of the papers, upon which the order was granted, must be delivered with the copy of the order.

See, also, Gen. Rules Practice 4 and 13 and Gen. Corp. Law, § 305, ante, as to injunctions suspending corporate business.

§ 624. Injunction, damages. Where the defendant enjoined was an officer of a corporation, or joint stock association, or a bailee, agent, trustee, or other representative of another, and the damages sustained by him, are less than the sum specified in the undertaking, the court or the referee may also separately ascertain and determine the damages sustained, by reason of the injunction, by the corporation, association, or person, whom the defendant represents, to an amount not exceeding the surplus of the sum specified in the undertaking; and those damages may be recovered in a separate action, brought as prescribed in the next section.

§ 625. Injunction; action on undertaking. Where the damages have been ascertained by the decision of the court, or the confirmation of a referee's report, as prescribed in the last two sections, any person, entitled to the benefit of an undertaking, executed pursuant to the

provisions of this title, may bring an action thereon, without further leave of the court.

§ 635. Attachments; in what actions. A warrant of attachment against the property of one or more defendants in an action, may be granted upon the application of the plaintiff, as specified in the next section, where the action is to recover a sum of money only, as damages for one or more of the following causes:

1. Breach of contract, express or implied, other than a contract to marry.
2. Wrongful conversion of personal property.
3. An injury to property in consequence of negligence, fraud or other wrongful act.

Thus am'd by L. 1894, ch. 738, and L. 1895, ch. 578.

§ 636. Foreign corporation; attachment. To entitle the plaintiff to such a warrant he must show, by affidavit, to the satisfaction of the judge granting the same, as follows:

1. That one of the causes of action specified in the last section exists against the defendant. If the action is to recover damages for breach of a contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counterclaims known to him.

2. That the defendant is either a foreign corporation or not a resident of the state; or, if he is a natural person and a resident of the state, that he has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent; or, if the defendant is a natural person, or a domestic corporation, that he or it has removed, or is about to remove, property from the state, with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or

secrete property with the like intent; or where, for the purpose of procuring credit, or the extension of credit, the defendant has, made a false statement in writing under his own hand or signature, or under the hand or signature of a duly authorized agent, made with his knowledge and acquiescence as to his financial responsibility or standing.

* * * * *

Thus am'd by L. 1894, ch. 736; L. 1895, ch. 578; L. 1899, ch. 598.

A debt due from a foreign corporation to a non-resident debtor cannot be attached at the instance of a resident creditor of the latter. *Wood v. Furtick*, 17 Misc. 561. An attachment proceeding is dependent for its validity upon the presence of the res., the debt, within the jurisdiction of the court; and the situs of a debt is at the place of residence of the creditor; such residence of a corporation is within the domain of the sovereignty which created it. *Id.*, *Douglas v. Phenix Ins. Co.*, 138 N. Y. 209; *Nat'l Broadway Bk. v. Sampson*, 179 N. Y. 213.

The papers upon which a foreign corporation doing business in the State of New York, in relation to a transaction arising in such State, procures an attachment, must show, for the purposes of the attachment, that the corporation has complied with section 15 of the General Corporation Law. *Sawyer Lumber Co. v. Bussell*, 84 Hun 114.

Where the plaintiff in an action procures an attachment for a cause of action which arises in the State of New York, it is necessary, in order that the court shall acquire jurisdiction, that it shall appear that the plaintiff is a resident of the State. *Sawyer Lumber Co. v. Bussell*, 84 Hun 114; *Smith v. Union Milk Co.*, 70 Hun 348, *affd.*, on *op.* below, 143 N. Y. 622.

Unless the jurisdictional facts appear in the papers upon which a warrant of attachment is granted against a foreign corporation the attachment must be set aside. The plain meaning of the Code is that it must appear by affidavit that a cause of action of which the court has jurisdiction exists to the satisfaction of the judge granting the warrant. *Ladenburg v. Commercial Bk. of Newfoundland*, 87 Hun 269.

An attachment against a corporation will not be justified because of fraudulent acts of the president in disposing of his individual property. *Central Nat. Bk. v. Fort Ann Woolen Co.*, 57 St. Rep. 316.

Where the damages are unliquidated, the papers must contain facts from which the court can determine for itself whether the amount claimed is proper. Merely stating that a specified amount is due is not sufficient. *Delafield v. Armsby Co.*, 62 App. Div. 262; *Southwell v. Kingsland*, 85 App. Div. 384; *James v. Signell*, 60 App. Div. 75.

§ 646. Foreign corporation; attachment of unpaid subscription to. Under a warrant of attachment against a foreign corporation, other than a corporation created by or under the laws of the United States, the sheriff may levy upon the sum remaining unpaid upon a subscription to the capital stock of the corporation, made by a person within the county; or upon one or more shares of stock therein, held by such a person, or transferred by him, for the purpose of avoiding payment thereof.

§ 647. Interest in shares or bonds. The rights or shares which the defendant has in the stock of an association or corporation, or in a bond negotiable or otherwise, together with the interest and profits thereon, may be levied upon; and the sheriff's certificate of the sale thereof entitles the purchaser to the same rights and privileges, with respect thereto, which the defendant had when they were so attached.

Thus am'd by L. 1911, ch. 419.

§ 648. Attachment of corporation bonds, notes, etc. The attachment may also be levied upon a cause of action arising upon contract; including a bond, promissory note, or other instrument for the payment of money only, negotiable or otherwise, whether past due, or yet to become due, executed by a foreign or domestic government, state, county, public officer, association, municipal or other corporation, or by a private person, either within or without the state, which belongs to the defendant, and is found within the county. The levy of the attachment thereupon is deemed a levy upon, and a seizure and attachment of, the debt represented thereby.

Amended by L. 1907, ch. 318, relating to interest in decedent's estates which is not printed above.

Quære whether applicable to action on contract where the damages are unliquidated. *Pruyn v. McCreary*, 105 App. Div. 302.

§ 649. Shares of stock; how attached. A levy under a warrant of attachment must be made as follows:

* * * * * * *

3. Upon other personal property, by leaving a certified copy of the warrant, and a notice showing the property attached with the person holding the same; or, if it consists of a demand, other than as specified in the last subdivision, with the person against whom it exists; or, if it consists of right or share in the stock of an association or corporation, or interests or profits thereon, with the president, or other head of the association or corporation, or the secretary, cashier, or managing agent thereof. * * *

Amended by L. 1907, ch. 318, relating to interest in decedent's estates which is not printed above.

The receiver of a corporation, appointed in proceedings for a voluntary dissolution, is vested with title to the assets of the corporation upon the making of the order appointing him, and no superior lien is obtained by the levy of an attachment thereon between the making of such order and the taking of possession by the receiver. *Dickey v. Bates*, 13 Misc. 489.

§ 650. Shares of stock attached; certificate by the corporation. Upon the application of a sheriff, holding a warrant of attachment, the president or other head of an association or corporation, or the secretary, cashier, or managing agent thereof, or a debtor of the defendant, or a person holding property, including a bond, promissory note, or other instrument for the payment of money, belonging to the defendant, must furnish to the sheriff a certificate, under his hand, specifying the rights or number of shares of the defendant, in the stock of the association or corporation, with all dividends, or incumbrances thereon; or the amount, nature, and description of the property, held for the benefit of the defendant, or of the defendant's interest in property so held, or of the debt or demand owing to the defendant, as the case requires.

§ 651. Refusal of corporation to give information. If a person to whom application is made, as prescribed in the last section, refuses to give such a certificate; or if

it is made to appear, by affidavit, to the satisfaction of the court, or a judge thereof, or the county judge of the county to which the warrant is issued, that there is reason to suspect that a certificate given by him is untrue, or that it fails fully to set forth the facts, required to be shown thereby; the court or judge may make an order, directing him to attend, at a specified time, and at a place within the county, to which the warrant is issued, and submit to an examination under oath, concerning the same. The order may, in the discretion of the court or judge, direct an appearance before a referee named therein.

§ 707. Foreign corporation; judgment enforceable only against attached property. Where a defendant, who has not appeared, is a non-resident of the State, or a foreign corporation, and the summons was served without the State, or by publication, pursuant to an order obtained for that purpose, as prescribed in chapter fifth of this act, the judgment can be enforced only against the property which has been levied upon, by virtue of the warrant of attachment, at the time when the judgment is entered. But this section does not declare the effect of such a judgment, with respect to the application of any statute of limitation.

§ 791. Certain actions against corporations entitled to preference. Civil causes are entitled to preference among themselves, in the trial or hearing thereof, in the following order, next after the causes specified in the last section but one:

* * * * * * *

7. An action against a corporation or joint-stock association, issuing bank notes or any kind of paper credits to circulate as money, or by or against the receiver of such corporation or association. An action in which a county or town is sole plaintiff or defendant.

8. An action against a corporation founded upon a note or other evidence of debt, for the absolute payment of money. An action upon an undertaking given upon an appeal to the court of appeals or to stay the execution on an appeal to the court of appeals.

Subdivision 8 applies to an action brought by one foreign corporation against another foreign corporation. *Martins Bank v. Amazonas Co.*, 98 App. Div. 146 (1904).

§ 839. Admission by member of corporation. The admission of a member of an aggregate corporation, who is not a party, shall not to be received as evidence against the corporation unless it was made concerning and while engaged in a transaction in which he was the authorized agent for the corporation; or unless it was made while a member of such corporation and testifying as a witness concerning a transaction of the corporation, when the official record of such testimony shall be received.

Thus am'd by L. 1903, ch. 384.

§ 929. Where a party wishes to prove an act or transaction of a foreign corporation, the book or books of the corporation may be used for that purpose, as presumptive evidence, whether any or all of the parties are or are not members of the corporation.

§ 930. Copies as evidence. If an original book is not produced at the trial, as prescribed in the last section, a copy thereof, or an entry therein, verified as prescribed in the next section, may be used, with like effect as the original book; provided that the party, intending to use the copy, gives the adverse party at least ten days' notice of his intention, specifying briefly the nature of the evidence to be given. But this and the next section do not apply, where the foreign corporation is a party to the action, and seeks to prove its own act or transaction, in its own behalf.

§ 931. Verification of copy. The copy must be verified by the deposition, taken as prescribed by law, or the oral testimony, taken at the trial, of the person who made it, or of a person who has examined and compared it with the original book or the entry therein. The witness must testify that the copy produced is correct; that he made it, or compared it with the original; and that he then knew that the original book so copied, or containing the entry, was the book of the corporation; or that it was then acknowledged to him to be such, by an officer or receiver of the corporation, or a person having the custody thereof, naming the person who made the acknowledgment; and he must specify where, and in whose custody, the original was then kept.

§ 931a. Copy of designation of person upon whom to make service, as evidence. An exemplified copy of a designation of a person upon whom to make service filed by a foreign corporation as provided in section sixteen of the general corporation law accompanied with a certificate that it has not been revoked, is presumptive evidence of the execution thereof, and conclusive evidence of the authority of the officer executing it.

Added by L. 1909, ch. 65, formerly Code Civ. Pro., § 432, subd. 2, in part.

§ 931b. Recital in order, resolution or record of public officers, board or body presumptive evidence of certain facts. A recital in any order, resolution or other record of any proceeding of a meeting referred to in section forty-one of the general construction law that such meeting had been held or adjourned as provided in said section or that it had been held upon notice to the members, as therein provided, shall be presumptive evidence thereof.

Added by L. 1909, ch. 65, formerly Statutory Construction Law, § 19, in part.

§ 1650. An action may be maintained, as prescribed in this article, by or against a corporation, or by or against an unincorporated association, as if it was a natural person, or such an action may be maintained by or against the receiver or other successor of any such corporation or association.

The article (ch. 14, t. 1, a. 5) relates to actions to compel the determination of a claim to real property.

§ 1775. Complaint in action by or against a corporation. In an action brought by or against a corporation, the complaint must aver that the plaintiff, or the defendant, as the case may be, is a corporation; must state whether it is a domestic corporation or a foreign corporation; and, if the latter, the state, country or government, by or under whose laws it was created. But the plaintiff need not set forth, or specially refer to, any act or proceeding, by or under which the corporation was created.

§ 1776. When proof of corporate existence unnecessary. In an action, brought by or against a corporation, the plaintiff need not prove, upon the trial, the existence of the corporation, unless the answer is verified, and contains an affirmative allegation that the plaintiff, or the defendant, as the case may be, is not a corporation.

A party who has entered into a contract with another, in which the latter assumes to be and contracts as a corporation, is estopped from denying the corporate existence. *U. S. Vinegar Co. v. Schlegel*, 143 N. Y. 537.

§ 1777. Misnomer, when waived. In an action or special proceeding brought by or against a corporation, the defendant is deemed to have waived any mistake in the statement of the corporate name, unless the misnomer is pleaded in the answer, or other pleading in the defendant's behalf.

§ 1778. Action against a corporation upon a note, etc. In an action against a foreign or domestic corporation, to

recover damages for the non-payment of a promissory note, or other evidence of debt, for the absolute payment of money, upon demand, or at a particular time, an order, extending the time to answer or demur, shall not be granted, except by the court, upon notice to the plaintiff's attorney. In such an action, unless the defendant serves, with a copy of his answer, or demurrer, copy of an order of a judge, directing that the issues presented by the pleadings be tried, the plaintiff may take judgment, as in case of default in pleading, at the expiration of twenty days after service of a copy of the complaint, either personally with the summons, or upon the defendant's attorney, pursuant to his demand therefor; or, if the service of the summons was otherwise than personal, at the expiration of twenty days after the service is complete.

Where a corporation defendant in an action upon a promissory note fails to serve with its answer a copy of an order directing that the issues be tried, the plaintiff may take judgment by default without returning the answer with a notice calling attention to the failure to serve said copy of order. *Watertown Nat. Bk. v. Westchester County Water Works Co.*, 19 Misc. 685.

§ 1779. When foreign corporation may sue. An action may be maintained by a foreign corporation, in like manner, and subject to the same regulations, as where the action is brought by a domestic corporation, except as otherwise specially prescribed by law. But a foreign corporation cannot maintain an action, founded upon an act, or upon a liability or obligation, express or implied, arising out of, or made and entered into in consideration of, an act, which the laws of the State forbid a corporation or association of individuals to do, without express authority of law. This section does not affect the validity of a meeting of the stockholders or directors of a foreign corporation, held within the State, where such a meeting is authorized by the laws of the State, country, or government, by or under which the corpora-

tion is created, or of an act, done at such a meeting, which is not in conflict with the same laws or the laws of the state.

For numerous cases respecting the right of a foreign corporation to sue, see Gen. Corp. Law, § 15.

The right of a foreign corporation to sue in this State is not dependent upon section 15, chapter 687 of the Laws of 1892. It is conferred by section 1779 of the Code, giving the same rights of maintaining actions as are possessed by domestic corporations, except as otherwise specially prescribed by law. Section 15 of the General Corporation Law only prohibits actions upon contracts made by corporations in this State after its passage until they shall have procured the necessary certificate of authority. Actions upon contracts made by other parties and assigned to the foreign corporations are not within the statute. *The O'Reilly, Skelly & Fogarty Co. v. Greene*, 18 Misc. 423.

§ 1780. When foreign corporation may be sued. An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:

1. Where the action is brought to recover damages for the breach of a contract, made within the State, or relating to property situated within the State, at the time of the making thereof.

2. Where it is brought to recover real property situated within the State, or a chattel, which is replevied within the State.

3. Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State.

A contract made between two foreign corporations by a written order mailed within the State and accepted in another State where one of the corporations is domiciled is not a contract made within this State, as the contract was not completed until the acceptance of the order; therefore a certificate, under section 15 of the General Corporation Law, authorizing the vendor corporation to do business here, was not necessary. A cause of action based on a default in paying for goods delivered in this

State on such contract arises here and can be maintained under subdivision 3 of the foregoing section. *Shelby Steel Tube Co. v. Burgess Gun Co.*, 8 App. Div. 444.

Where a contract was made in the city of New York for work to be done in Illinois and payment was to be made in bonds without specifying the place of delivery of such bonds, the presumption is that the bonds were to be delivered in New York, therefore the cause of action for their non-delivery would be one coming under the third subdivision of the foregoing section. *O'Brien v. Peoria Water Co.*, 5 App. Div. 229.

The City Court of New York has jurisdiction in an action where the plaintiff resides within this State, and the cause of action arises therein, although the defendant is a foreign corporation, service upon it having been made within the State. *Mass v. Cunard S. S. Co.*, 18 Misc. 379.

The courts of this State may decline to exercise jurisdiction in an action to enforce a contract between foreign railroad corporations for transportation to be performed in the State of their common domicile, and an injunction pendente lite, restraining violations of such contract, and thus restricting the defendant to that extent in the exercise in that State of its full corporate rights, should not be granted. *D., L. & W. R. R. Co. v. N. Y., S. & W. R. R. Co.*, 12 Misc. 231.

When, in an action against a foreign corporation, the status of the plaintiff as a foreign corporation or non-resident is conceded or otherwise ascertained, and the case is not one of class enumerated in section 1780, the court must dismiss the action. *Gundlin v. Hamburg-American Packet Co.*, 8 Misc. 291.

Where a contract between foreign corporations was not made in this State, or the cause of action did not arise here, the voluntary appearance of defendant in an action on such contract does not confer jurisdiction on the court. *Seiser Bros. Co. v. Potter Produce Co.*, 62 St. Rep. 69, 23 Civ. Pro. Rep. 348.

§ 1948. Action by attorney-general. The attorney-general may maintain an action, upon his own information, or upon the complaint of a private person in either of the following cases:

1. Against a person who usurps, intrudes into, or unlawfully holds or exercises, within the state, a franchise, or a public office, civil or military, or an office in a domestic corporation.

* * * * *

3. Against one or more persons who act as a corporation within the state, without being duly incorporated; or exercise within the state, any corporate rights, privi-

leges, or franchises, not granted to them by the law of the state.

4. Against a foreign corporation which exercises within the state any corporate rights, privileges or franchises, not granted to it by the law of this state; or which within the state, has violated any provision of law, or contrary to law, has done or omitted any act, or has exercised a privilege or franchise, not conferred upon it by the law of this state, where; in a similar case, a domestic corporation would, in accordance with section seventeen hundred and ninety-eight of this act, be liable to an action to vacate its charter and to annul its existence; or which exercises within the state any corporate rights, privileges or franchises in a manner contrary to the public policy of the state.

Subdivision 4 is new, added by L. 1896, ch. '962.

This section contemplates an action against individuals and not against corporations. *Peo. v. Equity Gas Light Co.*, 141 N. Y. 232; *Peo. ex rel. Haberman v. James*, 5 App. Div. 412; *Peo. v. Consolidated Gas Co.*, 130 App. Div. 626.

An action may be brought under the third subdivision of this section for a perpetual injunction restraining persons from transacting the business of a corporation after the term for which the corporation was organized had expired, but in such action the corporation is not a proper party. *Peo. ex rel. Haberman v. James*, 5 App. Div. 412.

Under the foregoing section an action cannot be maintained in the name of the people to close up the affairs of the corporation or to distribute its assets, as section 35 of the General Corporation Law provides that when the existence of a corporation terminates its assets shall be held by the directors as trustees for its creditors and stockholders with full power to close up its affairs. *Peo. ex rel. Haberman v. James*, 5 App. Div. 412. If such an action becomes necessary it should be brought by a creditor or stockholder. *Id.*

An extension of the term of existence of a corporation cannot be accomplished by reincorporation under the provisions of section 4 of the Business Corporations Law. *Peo. ex rel. Haberman v. James*, 5 App. Div. 412.

§ 2865. Justices' courts, actions in. An action cognizable by a justice of the peace, may be brought by or against a corporation; by or against a natural person in

his own right; by or against a town or county officer in his official character; or by an executor, administrator, trustee of an express trust, or a receiver in supplementary proceedings.

§ 2879. Justices' courts; summons, service upon corporations generally. Where the defendant to be served is a corporation, or person, company or partnership doing business in another county than that in which he or it resides, the summons may be personally served upon it or him by delivering a copy thereof to an officer, managing agent or person to whom a copy of the summons in an action brought against the corporation in the supreme court might be delivered as prescribed in sections four hundred and thirty-one and four hundred and thirty-two of this act, or, to any director, managing agent or trustee of the corporation, person, partnership or company by whatever official title he or it is called.

Thus am'd by L. 1904, ch. 527.

§ 2905. Justices' Courts. In what actions warrant of attachment may be granted. In an action brought before a justice of the peace a warrant of attachment against the property of one or more defendants must be granted, upon the application of the plaintiff, as prescribed in this article, where the action is brought upon a judgment, or to recover for one or more of the following causes:

1. Breach of a contract, express or implied.
2. Wrongful conversion of personal property.
3. Any other injury to personal property, in consequence of negligence, fraud, or other misconduct.

§ 2906. What must be shown to procure a warrant. To entitle the plaintiff to such a warrant, he must show, by affidavit, to the satisfaction of the justice as follows:

1. That a sufficient cause of action exists against the defendant, to recover damages for one or more of the

causes specified in the last section. If the action is upon a judgment, or to recover for breach of a contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counterclaims known to him.

2. That the defendant is either a foreign corporation;
 * * * or, if the defendant is a natural person, or a domestic corporation, that he or it has removed, or is about to remove, property from the county where the defendant being a natural person, last resided, or, being a corporation, last kept its principal office, or from the county in which the action is brought, with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property, with the like intent; * * * * *

The affidavit must be filed with the justice when the warrant is granted.

§ 3268. In action by foreign corporations security for costs may be required. The defendant, in an action brought in a court of record, may require security for costs to be given, as prescribed in this title, where the plaintiff was, when the action was commenced, either

* * * * *

2. A foreign corporation.

* * * * *

§ 3343. Corporation defined. In construing this act, the following rules must be observed, except where a contrary intent is expressly declared in the provision to be construed, or plainly apparent from the context thereof:

* * * * *

18. A "domestic corporation" is a corporation created by or under the laws of the State, or located in the State,

and created by or under the laws of the United States, or by or pursuant to the laws, in force in the colony of New York, before the 19th day of April, in the year 1775. Every other corporation is a "foreign corporation."

See also the definition of a domestic corporation in the General Corporation Law, § 3, subd. 5, ante.

A national bank doing business in New York city is a domestic corporation. *Matter of Cushing*, 40 Misc. 505; but a national bank located in another State is a foreign corporation. *Beckham v. Hague*, 44 App. Div. 146.

THE LABOR LAW

Laws of 1909, Chapter 36, Entitled: "An Act Relating to Labor, Constituting Chapter Thirty-one of the Consolidated Laws," as Amended to the Commencement of the Legislative Session of 1912.

Provisions Relative to Business Corporations

§ 3. Hours to constitute a day's work. Eight hours shall constitute a legal day's work for all classes of employees in this state except those engaged in farm and domestic service unless otherwise provided by law. This section does not prevent an agreement for overwork at an increased compensation except upon work by or for the state or a municipal corporation, or by contractors or subcontractors therewith. * * *

Formerly Labor Law, § 1, ch. 415, L. 1897, as am'd by L. 1899, ch. 567; L. 1900, ch. 298; L. 1906, ch. 506, and L. 1909, ch. 292.

The remaining portion of the above section does not apply to business corporations.

§ 5. Hours of labor in brickyards. Ten hours, exclusive of the necessary time for meals, shall constitute a legal day's work in the making of brick in brickyards owned or operated by corporations. No corporation owning or operating such brickyard shall require employees to work more than ten hours in any one day, or to commence work before seven o'clock in the morning. But overwork and work prior to seven o'clock in the

morning for extra compensation may be performed by agreement between employer and employee.

Formerly L. 1897, ch. 415, § 8.

§ 9. Payment of wages by receivers. Upon the appointment of a receiver of a partnership or of a corporation organized under the laws of this state and doing business therein, other than a moneyed corporation, the wages of the employees of such partnership or corporation shall be preferred to every other debt or claim.

Formerly L. 1897, ch. 415, § 8.

Section 2 of the Labor Law provides as follows: "Definitions. Employee. The term "employee," when used in this chapter, means a mechanic, workingman or laborer who works for another for hire."

Legislation of this character confers upon a class of persons having a specific contractual relation with corporations new and unusual privileges and securities at the expense of other creditors whose distributive share of the assets is diminished. It is in derogation of the common law and should not be extended to cases not within the reason as well as within the words of the statute. *Matter of Stryker*, 158 N. Y. 526.

§ 10. Cash payment of wages. Every manufacturing, mining, quarrying, mercantile, railroad, street railway, canal, steamboat, telegraph and telephone company, every express company, every corporation engaged in harvesting and storing ice, and every water company, not municipal, and every person, firm or corporation, engaged in or upon any public work for the state or municipal corporation thereof, either as a contractor or a subcontractor therewith, shall pay to each employee engaged in his, their or its business the wages earned by such employee in cash. No such company, person, firm or corporation shall hereafter pay such employees in scrip, commonly known as store money-orders. No person, firm or corporation engaged in carrying on public work under contract with the state or with any municipal corporation of the state, either as a contractor or subcontractor therewith, shall, directly or indirectly, conduct or carry on what is commonly known as a company store,

if there shall, at the time, be any store selling supplies within two miles of the place where such contract is being executed. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor.

Formerly L. 1897, ch. 415, § 9, as am'd by L. 1906, ch. 316, § 1.

This section as applied to pre-existing corporations is a valid exercise of the reserved legislative authority to amend the charters of corporations and also a valid exercise of the police power of the State. *N. Y. C. & H. R. R. R. Co. v. Williams*, 64 Misc. 15.

§ 11. When wages are to be paid. Every corporation or joint-stock association, or person carrying on the business thereof by lease or otherwise, shall pay weekly to each employee the wages earned by him to a day not more than six days prior to the date of such payment.

But every person or corporation operating a steam surface railroad shall, on or before the first day of each month, pay the employees thereof the wages earned by them during the first half of the preceding month ending with the fifteenth day thereof, and on or before the fifteenth day of each month pay the employees thereof the wages earned by them during the last half of the preceding calendar month.

Formerly L. 1897, ch. 415, § 10.

This section as applied to pre-existing corporations is a valid exercise of the reserved legislative authority to amend the charters of corporations. *N. Y. C. & H. R. R. R. Co. v. Williams*, 64 Misc. 15.

§ 12. Penalty for violation of preceding section. If a corporation or joint-stock association, its lessee or other person carrying on the business thereof, shall fail to pay the wages of all its employees, as provided in this article, it shall forfeit to the people of the state the sum of fifty dollars for each such failure, to be recovered by the commissioner of labor in his name of office in a civil action.

Thus am'd by L. 1909, ch. 206. Formerly L. 1897, ch. 415, § 11.
See, also, Penal Law, §§ 1271 and 1272, ante,

FORMS

Form No. 1.

* Certificate of Incorporation of a Business Corporation.

See the Business Corporations Law, § 2.

We, the undersigned, all being persons of full age, and at least two-thirds being citizens of the United States, and at least one of us a resident of the State of New York, desiring to form a stock corporation, pursuant to the provisions of the Business Corporations Law of the State of New York, do hereby make, sign, acknowledge and file this certificate for that purpose, as follows:

First. The name of the proposed corporation is [*insert corporate name.*]

Second. The purposes for which it is to be formed are [*insert statement of objects.*]

Third. The amount of the capital stock is [*insert the amount*] dollars (\$).

[*If any portion is to be preferred stock, the preferences must be stated; see example, Form No. 2.*]

[*If voting powers of holders of preferred shares are to be restricted, see example, Form No. 3.*]

Fourth. The number of shares of which the capital stock shall consist is [*the number fixed must be such that the par value shall not be less than five dollars nor more than one hundred dollars each*], of the par value of \$ each, and the amount of capital with which said corporation will begin business is [*state a definite amount, but not less than five hundred dollars.*]

* For a discussion of matters pertaining to the preparation of the certificate of incorporation, see the notes to section 2 of the Business Corporations Law, pages 4-11, ante.

Fifth. Its principal business office is to be located in the [city, village or town] of _____, in the county of _____, State of New York. [If in the city of New York insert also the name of the borough.]

Sixth. Its duration is to be [insert number of years, or say perpetual if desired].

Seventh. The number of its directors is to be [insert a definite number, but not less than three].

Eighth. The names and post-office addresses of the directors for the first year are as follows:

Names.	Post-office addresses.
.....
.....
.....

Ninth. The names and post-office addresses of the subscribers to this certificate and a statement of the number of shares of stock which each agrees to take in the corporation are as follows:

Names.	Post-office addresses.	Number of shares.
.....
.....
.....

Tenth. [If desired the certificate may contain any other provisions for the regulation of the business and the conduct of the affairs of the corporation and any limitation upon its powers and upon the powers of its directors and stockholders which does not exempt them from any obligation or from the performance of any duty imposed by law.

IN WITNESS WHEREOF, we have made, signed, acknowledged and filed this certificate in duplicate.

Dated, this _____ day of _____, 19 _____.

[Signatures of incorporators, not less than three in number.]

STATE OF NEW YORK, }
 County of } ss.:

On this day of , 19 , before me personally came [*insert names of subscribers to certificate*], to me known and known to me to be the persons described in and who executed the foregoing certificate and severally duly acknowledged to me that they executed the same.

[*Signature of Notary.*]

Upon filing and recording the certificate of incorporation in the office of the Secretary of State, the fees to be paid are: Filing, ten dollars; recording, fifteen cents per folio. Upon filing and recording a certified copy or duplicate original thereof in the office of the county clerk, the fees to be paid are: Filing, six cents; recording, ten cents per folio. In addition to such payments an organization tax of one-twentieth of one per cent. upon the amount of the capital stock must be paid to the State Treasurer. See the statutes regulating such payments and further information relative thereto, pages 31-45.

Form No. 2.

Example of Stock Preference.

Third: The amount of the capital stock is to be two hundred thousand dollars (\$200,000), of which amount one hundred thousand dollars (\$100,000) shall be preferred stock, and one hundred thousand dollars (\$100,000) shall be common stock.

The holders of preferred stock shall be entitled to receive out of the surplus or net earnings of each fiscal year cumulative dividends at the rate of per cent. per annum, payable at such periods as the board of directors may determine, before any dividend shall be set apart or paid to the holders of the common stock for

such year, and the remainder of the surplus or net earnings, applicable to that purpose, shall be paid as dividends to the holders of the common stock, as and when the board of directors shall determine.

In the event of the dissolution, liquidation or winding up of the corporation, the assets and funds thereof, after the payment of debts, shall be applied, first, to the payment to the holders of the preferred shares of the amount paid in thereon, with any arrearages of dividends; and, after such payment, the balance of the assets and funds of the corporation shall be distributed wholly among the holders of the common stock.

Fourth: The number of shares of which the capital stock shall consist is to be two thousand (2,000) of the par value of one hundred dollars (\$100) each, being one thousand (1,000) shares of common stock and one thousand (1,000) shares of preferred stock, and the amount of capital with which said corporation will begin business is five hundred dollars (\$500).

Form No. 3.

Restriction of Voting Power.

Said preferred stock shall not be entitled to vote at any meeting of the stockholders, except as may be otherwise expressly provided by law, and shall not be entitled to participate in the management of the corporation. Such right to vote at any meeting for the election of directors or at any meeting of stockholders concerning the management of the corporation, except as may be otherwise expressly provided by law, shall be exercised exclusively by the holders of the common stock.

Form No. 4.

Certificate of Payment of One-Half Capital Stock of a Business Corporation.

[See the Business Corporations Law, § 5.]

We, the undersigned, being a majority of the directors of the [*insert corporate name*], a corporation formed under the provisions of the Business Corporations Law of the State of New York, do hereby certify:

That the amount of the capital stock of said corporation is [*insert amount*] dollars, and that one-half thereof has been paid in, \$. having been paid in cash, and \$. in property.

IN WITNESS WHEREOF, we have made, signed and acknowledged this certificate in duplicate, and have hereunto set our hands this day of, 19..

[*Signatures of majority of directors.*]

STATE OF NEW YORK, }
County of , } ss.:

On this day of, 19.., before me personally came [*name directors signing certificate*] to me personally known and known to me to be the persons described in and who executed the foregoing certificate, and severally acknowledged to me that they executed the same.

[*Signature of Notary.*]

STATE OF NEW YORK, }
County of , } ss.:

[*Insert names of president (or vice-president) and secretary (or treasurer)*], being severally duly sworn, each for himself, deposes and says, that he, the said is the president [*or vice-president*] of the [*insert corporate name*], and that he, the said, is the secretary

[or treasurer] thereof, and that the statements contained in the foregoing certificate are true.

[Signature of President, or Vice-President.]

[Signature of Secretary, or Treasurer.]

Sworn to before me, this }
 day of, 19... }
 [Signature of Notary.]

Upon filing and recording the foregoing certificate the fees are as follows: Office of Secretary of State, a recording fee only of fifteen cents per folio. At the county clerk's office, six cents for filing and ten cents per folio for recording.

Form No. 5.

By-Laws for Stock Corporations.

See the General Corporation Law, § 11.

BY-LAWS OF THE COMPANY.

ARTICLE I.—MEETING OF STOCKHOLDERS.

Section 1. The annual meeting of the stockholders of this company shall be held at the office of the corporation in the of, on the [*e. g., second Monday in January,*] of each and every year, at 12 o'clock, noon, for the election of directors and such other business as may properly come before said meeting. Notice of the time, place and object of such meeting shall be given by publication thereof, at least once in each week for two successive weeks immediately preceding such meeting, in the manner required by the Stock Corporation Law, section 25, and by serving personally or by mailing, at least days previous to such meeting, postage prepaid, a copy of such notice, addressed to each stockholder at his residence or place of business, as the same shall appear on the books of the corporation. No business, other than that stated in such notice, shall be transacted at such meeting without

the unanimous consent of all the stockholders present thereat, in person or by proxy.

Section 2. Special meetings of stockholders, other than those regulated by statute, may be called at any time by a majority of the directors. It shall also be the duty of the president to call such meetings whenever requested in writing, so to do, by stockholders owning of the capital stock. A notice of every special meeting, stating the time, place and object thereof, shall be given by mailing, postage prepaid, at least days before such meeting, a copy of such notice addressed to each stockholder at his post-office address as the same appears on the books of the corporation.

Section 3. At all meetings of stockholders there shall be present, either in person or by proxy, stockholders owning of the capital stock of the corporation in order to constitute a quorum, except at special elections of directors pursuant to section 30 of the General Corporation Law.

Section 4. At all annual meetings of stockholders the right of any stockholder to vote shall be governed and determined as prescribed in the General Corporation Law, sections 23, 26 and 27.

Section 5. If, for any reason, the annual meeting of stockholders shall not be held as hereinbefore provided, such annual meeting shall be called and conducted as prescribed in the General Corporation Law, sections 28, 29, 30 and 31.

Section 6. At all meetings of stockholders, only such persons shall be entitled to vote in person and by proxy who appear as stockholders upon the transfer books of the corporation for days immediately preceding such meeting.

Section 7. At the annual meetings of stockholders the following shall be the order of business, viz.:

1. Calling the roll.
2. Proof of proper notice of meeting.
3. Report of President.
4. Report of Treasurer.
5. Report of Secretary.
6. Report of Committees.
7. Election of Directors.
8. Miscellaneous business.

Section 8. At all meetings of stockholders all questions except the question of an amendment to the by-laws, and the election of directors and inspectors of election, and all such other questions, the manner of deciding which is specially regulated by statute, shall be determined by a majority vote of the stockholders present in person or by proxy; provided, however, that any qualified voter may demand a stock vote, and in that case, such stock vote shall immediately be taken, and each stockholder present, in person or by proxy, shall be entitled to one vote for each share of stock owned by him. All voting shall be viva voce, except that a stock vote shall be by ballot, each of which shall state the name of the stockholder voting and the number of shares owned by him, and in addition, if such ballot be cast by a proxy, it shall also state the name of such proxy.

Section 9. At special meetings of stockholders the provisions of sections 23, 26 27 and 31 of the General Corporation Law shall apply to the casting of all votes.

ARTICLE II.—DIRECTORS.

Section 1. The directors of this corporation shall be elected by ballot, for the term of one year, at the annual meeting of stockholders, except as hereinafter otherwise provided for filling vacancies. The directors shall be chosen by a plurality of the votes of the stockholders, voting either in person or by proxy, at such annual elec-

tion as provided by section 25 of the Stock Corporation Law.

Section 2. Vacancies in the board of directors, occurring during the year, shall be filled for the unexpired term, by a majority vote of the remaining directors at any special meeting called for that purpose, or at any regular meeting of the board.

Section 3. In case the entire board of directors shall die or resign, any stockholder may call a special meeting in the same manner that the president may call such meetings, and directors for the unexpired term may be elected at such special meeting in the manner provided for their election at annual meetings.

Section 4. The board of directors may adopt such rules and regulations for the conduct of their meetings and management of the affairs of the corporation as they may deem proper, not inconsistent with the laws of the State of New York, or these by-laws.

Section 5. The board of directors shall meet on the [*e. g., second Monday*] of every month, and whenever called together by the president upon due notice given to each director. On the written request of any director the secretary shall call a special meeting of the board.

Section 6. All committees shall be appointed by the board of directors.

ARTICLE III.—OFFICERS.

Section 1. The board of directors, immediately after the annual meeting, shall choose one of their number by a majority vote to be president, and they shall also appoint a vice-president, secretary and treasurer. Each of such officers shall serve for the term of one year, or until the next annual election.

Section 2. The president shall preside at all meetings of the board of directors, and shall act as temporary

chairman at, and call to order all meetings of the stockholders. He shall sign certificates of stock, sign and execute all contracts in the name of the company, when authorized so to do by the board of directors; counter-sign all checks drawn by the treasurer; appoint and discharge agents and employees, subject to the approval of the board of directors, and he shall have the general management of the affairs of the corporation and perform all the duties incidental to his office.

Section 3. The vice-president shall, in the absence or incapacity of the president, perform the duties of that officer.

Section 4. The treasurer shall have the care and custody of all the funds and securities of the corporation, and deposit the same in the name of the corporation in such bank or banks as the directors may elect; he shall sign all checks, drafts, notes and orders for the payment of money, which shall be countersigned by the president, and he shall pay out and dispose of the same under the direction of the president; he shall at all reasonable times exhibit his books and accounts to any director or stockholder of the company upon application at the office of the company during business hours; he shall sign all certificates of stock signed by the president; he shall give such bonds for the faithful performance of his duties as the board of directors may determine.

Section 5. The secretary shall keep the minutes of the board of directors, and also the minutes of the meetings of stockholders; he shall attend to the giving and serving of all notices of the company, and shall affix the seal of the company to all certificates of stock, when signed by the president and treasurer; he shall have charge of the certificate book and such other books and papers as the board may direct; he shall attend to such correspondence as may be assigned to him, and perform

all the duties incidental to his office. He shall also keep a stock-book, containing the names, alphabetically arranged, of all persons who are stockholders of the corporation, showing their places of residence, the number of shares of stock held by them respectively, the time when they respectively became the owners thereof, and the amount paid thereon, and such book shall be open for inspection as prescribed by section 29 of the Stock Corporation Law.

ARTICLE IV.—CAPITAL STOCK.

Section 1. Subscriptions to the capital stock must be paid to the treasurer at such time or times, and in such installments, as the board of directors may by resolution require. Any failure to pay an installment when required to be paid by the board of directors shall work a forfeiture of such shares of stock in arrears, pursuant to section 54 of the Stock Corporation Law.

Section 2. Certificates of stock shall be numbered and registered in the order they are issued, and shall be signed by the president or vice-president and by the secretary or treasurer, and the seal of the corporation shall be affixed thereto. All certificates shall be bound in a book, and shall be issued in consecutive order therefrom, and in the margin thereof shall be entered the name of the person owning the shares therein represented, the number of shares, and the date thereof. All certificates exchanged or returned to the corporation shall be marked canceled, with the date of cancellation, by the secretary, and shall be immediately pasted in the certificate book, opposite the memorandum of its issue.

Section 3. Transfers of shares shall only be made upon the books of the corporation by the holder in person or by power of attorney duly executed and acknowledged and filed with the secretary of the corporation,

and on the surrender of the certificate or certificates of such shares.

Section 4. Whenever the capital stock of the corporation is increased, each bona fide owner of its stock shall be entitled to purchase, at the par value thereof, an amount of stock in proportion to the number of shares of stock he owns in the corporation at the time of such increase.

ARTICLE V.—DIVIDENDS.

Section 1. Dividends shall be declared and paid out of the surplus profits of the corporation as often and at such times as the board of directors may determine, and in accordance with section 28 of the Stock Corporation Law.

ARTICLE VI.—INSPECTORS.

Section 1. Two inspectors of election shall be elected at each annual meeting of stockholders to serve for one year, and if any inspector shall refuse to serve or shall not be present, the meeting may appoint an inspector in his place.

ARTICLE VII.—SEAL.

Section 1. The seal of the corporation shall be in the form of a circle, and shall bear the name of the corporation and the year of its incorporation.

ARTICLE VIII.—AMENDMENTS.

Section 1. These by-laws may be amended at any stockholders' meeting by a vote of the stockholders owning a majority of the stock, represented either in person or by proxy, provided the proposed amendment is inserted in the notice of such meeting. A copy of such amended by-law shall be sent to each stockholder within ten days after the adoption of the same.

ARTICLE IX.—WAIVER OF NOTICE.

Section 1. Whenever under the provisions of these by-laws or of any of the corporate laws the stockholders' or directors are authorized to hold any meeting after notice or after the lapse of any prescribed period of time, such meeting may be held without notice and without such lapse of time by a written waiver of such notice signed by every person entitled to notice.

Form No. 6.

Certificate of Stock.

See the Stock Corporation Law, § 50.

No. No. of shares

The Company.

Incorporated under the Laws of the State of New York.

Capital Stock, \$..... Shares, \$..... each.

THIS IS TO CERTIFY that is the owner of shares of the capital stock of The Company, transferable only on the books of the company by the holder hereof, in person or by attorney, upon surrender of this certificate properly endorsed.

IN WITNESS WHEREOF, the said company has caused
 { *Corporate* } this certificate to be signed by its duly
 { *Seal* } authorized officers and its corporate seal
 to be affixed this day of, 19...

.....

.....

Secretary

President

[or *Treasurer*].

[or *Vice-President*].

On the reverse side of the certificate of stock should be printed a blank transfer, as follows:

For value received, I hereby sell, assign and transfer unto shares of the within mentioned stock, and do hereby irrevocably constitute and appoint my true and lawful attorney to transfer the same on the books of the company.

Witness my hand and seal, this . . . day of, 19...

Witness:

.....[Seal.]

The provisions of section 51 of the Stock Corporation Law may also be printed on the back of each certificate of stock, if desired.

For forms of certificate of common and preferred stock, see Forms Nos. 7 and 8.

Form No. 7.

Certificate of Common Stock.

See Stock Corporation Law, §§ 50 and 61.

Incorporated under Laws of State of New York.

The.....Company.

Authorized capital stock, \$2,000,000.

Preferred stock, \$500,000. Common stock, \$1,500,000.

No. ... Par value, \$100 each. No. shares,

THIS IS TO CERTIFY that is the owner of shares of the Common Stock of The Company, transferable only on the books of the company by the holder hereof in person or by attorney upon surrender of this certificate, properly endorsed.

The Preferred Stock is entitled, in preference and priority to the rights of the Common Stock, to cumulative dividends out of net earnings at the rate of per cent. per annum, and also to the payment of the par value of such preferred stock with any accrued dividends then unpaid thereon in any distribution of assets, but to no other dividend or payment,

* Said preferred stock shall not be entitled to vote at any meeting of the stockholders, except as otherwise required by statute.

IN WITNESS WHEREOF, the said company has caused this certificate to be signed by its duly authorized officers and its corporate seal to be affixed this day of, 19...

.....

Secretary

[*or Treasurer*].

.....

President

[*or Vice-President*].

[*Form of indorsement on back of certificate:*]

For value received, hereby sell, assign and transfer unto, shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint attorney, to transfer the said stock on the books of the within-named corporation, with full power of substitution in the premises.

Dated,, 19...

In presence of

[*Notice to follow indorsement:*]

Notice.—The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement, or any change whatever.

Form No. 8.

Certificate of Preferred Stock.

See Stock Corporation Law, §§ 50 and 61

Incorporated under Laws of State of New York.

The Company.

Authorized capital stock, \$2,000,000.

Preferred stock, \$500,000. Common stock, \$1,500,000.

No. Par value, \$100 each No. shares,

* Omit this clause if the preferred stock is to have voting powers.

THIS IS TO CERTIFY that is the owner of shares of the Preferred Stock of The Company, transferable only on the books of the company by the holder hereof in person or by attorney upon surrender of this certificate properly endorsed.

The Preferred Stock is entitled, in preference and priority to the rights of the Common Stock, to cumulative dividends out of net earnings at the rate of per cent. per annum, and also to the payment of the par value of such preferred stock with any accrued dividends then unpaid thereon in any distribution of assets, but to no other dividend or payment.

* Said preferred stock shall not be entitled to vote at any meeting of the stockholders, except as otherwise required by statute.

IN WITNESS WHEREOF, the said company has caused this certificate to be signed by its duly authorized officers and its corporate seal to be affixed this day of, 19.....

.....

Secretary

[or Treasurer].

.....

President

[or Vice-President].

[Form of indorsement on back of certificate.]

For value received, hereby sell, assign and transfer unto shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint attorney to transfer the said stock on the books of the within-named company, with full power of substitution in the premises.

Dated,, 19.....

.....

In presence of

.....

* Omit this clause if the preferred stock is to have voting powers.

[*Notice to follow indorsement.*]

Notice.—The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement, or any change whatever.

Form No. 9.

Certificate of Partly Paid Stock.

See the Stock Corporation Law, § 60.

No. No. of shares

The Company

(Incorporated under Laws of State of New York.)

Authorized capital stock \$ Shares, \$ each.

This Certifies that is the owner of shares of the partly paid capital stock of The Company, transferable only on the books of the company in person or by attorney on surrender of this certificate. Ten per cent. of the par value has been paid in cash on the shares of stock named in this certificate. The above-named holder of this certificate accepts the same subject to liability for the payment upon said shares of all instalments, not noted as paid upon the face or reverse of this certificate, which shall be called by the board of directors, prior to the transfer of this certificate upon the books of the company.

IN WITNESS WHEREOF the said company has caused its corporate seal to be affixed hereto and this { *Corporate Seal.* } certificate to be signed by its duly authorized officers, this day of, 19

.....

Secretary
[or Treasurer].

.....

President
[or Vice-President].

On the reverse of the certificate should be printed blank instalment receipts and a blank transfer as follows:

2d. Instalment.....%	Paid.....	.....
3d. Instalment.....%	Paid.....	.....
4th. Instalment.....%	Paid.....	.....
5th. Instalment.....%	Paid.....	.....
6th. Instalment.....%	Paid.....	.....
7th. Instalment.....%	Paid.....	.....
8th. Instalment.....%	Paid.....	.....
9th. Instalment.....%	Paid.....	.....
10th. Instalment.....%	Paid.....	.....

FOR VALUE RECEIVED hereby sell, assign and transfer unto shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint, attorney to transfer the said stock on the books of the within-named company with full power of substitution in the premises.

Dated,, 19.....

In presence of

.....

[*Notice to follow endorsement.*]

Notice.—The signature of this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement, or any change whatever.

Form No. 10.

Certified Resolution for Bank.

Resolved, That the funds of this company, until further ordered, be deposited in its name with the Bank [*or* *Trust Company*], and that the same be subject to check made in the corporate name, signed by the president [*or, as the case may be*], and countersigned by

the treasurer [*or secretary*], and that a copy of this resolution, certified by the secretary, be transmitted to the said bank [*or Trust Company*].

I, [*insert name*] secretary of the [*insert name*] Company, do hereby certify that I have compared the preceding with the resolution duly adopted at the meeting of the board of directors of said company duly held at No. 617 Mercer street, New York city, on December 28, 1911, at 10 o'clock, A. M., and I do hereby certify the same to be a correct transcript of said resolution and of the whole thereof.

WITNESS my hand and the corporate seal of said company, this 29th day of December, 1911.

[*Corporate seal.*]
Secretary.

Form No. 11.

Resolution Declaring Dividend

Resolved, That there be and hereby is declared from the surplus profits of the company a semi-annual dividend of three per cent. (3%) payable October 25, 1909, to stockholders of record at the close of business on October 11, 1909; and that the treasurer is hereby instructed and authorized to give due notice of such dividend, and to pay the same on the date specified.

Form No. 12.

Resolution Authorizing Corporation Note.

Resolved, That the president be and hereby is authorized to make a contract for the purchase of for the

use of this corporation, and is hereby authorized in carrying out such purchase to give notes of this corporation to the amount of dollars.

Form No. 13.

Promissory Note of Corporation.

\$..... ALBANY, N. Y.,, 19...

Four months after date, the [*insert name of corporation*] promises to pay to the order of [*name of payee*], dollars, at the Bank, Albany, N. Y.

Value received.

THE [*insert corporate name*] COMPANY,
By [*signature*], *President*.

Form No. 14.

Certificate of Incorporation of a Full Liability Business Corporation.

See the Business Corporations Law, § 6.

We, the undersigned, all being persons of full age, at least two-thirds of whom are citizens of the United States, and one of us a resident of the State of New York, desiring to form a full liability corporation, pursuant to the provisions of the Business Corporations Law of the State of New York, do hereby make, sign, acknowledge and file this certificate for that purpose, as follows:

First. The name of the proposed corporation is to be [*insert corporate name*] Company.

. [*Here insert remaining recitals of form No. 1.*]

As to fees payable upon filing and recording the certificates of incorporation, see notes to Form No. 1.

Form No. 15.

**Supplemental Certificate by a Business Corporation to Become
a Full Liability Corporation.**

See the Business Corporations Law, § 6.

We, the undersigned, the president and treasurer, respectively, of the [*insert name of corporation*], a corporation formed under the Business Corporations Law of the State of New York, do hereby certify, pursuant to the provisions of said law, in order that said corporation may become a full liability corporation, as follows:

That hereafter said corporation intends to be a full liability corporation.

That, pursuant to said law, we have annexed hereto a copy of a resolution, adopted by a two-thirds vote of the board of directors of said corporation, and the written consent of all the stockholders of said corporation, authorizing and consenting to the change of said corporation to a full liability corporation, marked, respectively, "Exhibit A" and "Exhibit B."

IN WITNESS WHEREOF, we have made, executed and acknowledged this certificate in duplicate, and have hereunto set our hands this day of, 19...

....., *President.*

....., *Treasurer.*

STATE OF NEW YORK, }
County of, } *ss.:*

On this day of, 19.., before me personally came [*names of president and treasurer*], to me known and known to me to be the persons described in and who executed the foregoing certificate and severally acknowledged to me that they executed the same for the uses and purposes therein mentioned.

[*Signature of Notary.*]

EXHIBIT A.

"*Resolved*, That this board does hereby authorize and consent to the change of the [*insert corporate name*] to a full liability corporation."

I hereby certify and declare the foregoing to be a true and correct copy of a resolution duly adopted by a two-thirds vote of the board of directors of the [*insert corporate name*] at a meeting of said board, held at....., on the day of, 19...

.....
Secretary.

EXHIBIT B.

We, the undersigned, stockholders of the [*insert corporate name*], do hereby, severally, give our written consent, authorizing and consenting to the change of said corporation to a full liability corporation.

IN WITNESS WHEREOF, we have hereunto set our hands to this consent in duplicate, and the number of shares of stock owned by each of us in said corporation.

Dated, the day of, 19...

A. B., shares.

C. D., shares.

E. F., shares.

STATE OF NEW YORK, }
County of, } ss.:

On this day of, 19..., before me personally came [*insert names*], to me known and known to me to be the persons described in and who executed the foregoing consent and severally acknowledged to me that they executed the same.

[Signature of Notary.]

STATE OF NEW YORK, }
 County of, } ss.:

A. B., being duly sworn, deposes and says, that he is the treasurer [*or secretary*] of the [*insert corporate name*], the corporation referred to in the foregoing consent, and that he is the custodian of the stock book of said corporation; that the persons who have subscribed the foregoing consent are all the stockholders of said corporation, and owners of the entire capital stock thereof.

A. B.

Sworn to before me this }
 day of, 19.. }

[*Signature of Notary.*]

Upon filing and recording the above certificate the fees payable are as noted under form No. 4.

Form No. 16.

Amended Certificate to Correct Informality or Defect.

See General Corporation Law, § 7.

AMENDED CERTIFICATE OF THE COMPANY.

We, the undersigned directors [*or incorporators*] of [*insert name of corporation*] for the purpose of correcting an informality in the original certificate of incorporation of said corporation consisting of [*e. g., an omission to state in said certificate the term of corporate existence of such corporation.*]

[*Or for the purpose of striking out matter not authorized by law to be stated in the original certificate of incorporation of said corporation, as follows, to wit: State unauthorized matter.*]

[*Or for the purpose of correcting a defect in the proof or acknowledgment appended to the original certificate of incorporation of said corporation*], do hereby make and

file this amended certificate, pursuant to the General Corporation Law of the State of New York, section 7, and for such purpose, do certify and declare as follows:

[Here insert the recitals for the supplying or correction of which the amended certificate is made; or omitting the matter unauthorized by law to be stated; or by making the desired correction.]

IN WITNESS WHEREOF, we have made and filed this amended certificate in duplicate, and have hereunto subscribed our names.

Dated, this day of, 19...

[Signature.]

STATE OF NEW YORK, }
County of, } ss.:

On this day of, 19.., before me personally came *[insert names]*, to me known and known to me to be the individuals described in and who executed the foregoing amended certificate, and they severally acknowledged to me that they executed the same.

[Signature of Notary.]

The fees upon filing this certificate are: Office of Secretary of State, fifteen cents a folio for recording; office of county clerk, filing, six cents, recording, ten cents a folio.

Form No. 17.

Amended Supplemental Certificate to Correct Informality or Defect.

See the General Corporation Law, § 7.

AMENDED SUPPLEMENTAL CERTIFICATE OF THE COMPANY.

We, the undersigned directors of *[insert corporate name]* Company, do hereby certify that in the certificate of reduc-

tion of capital stock of such corporation from \$150,000 to \$100,000, filed in the office of the Secretary of State on the day of, 19.., and in the office of the clerk of the county of on the day of, 19.., an informality exists, as follows, to wit:

[*Set forth the informality.*]

Therefore, we, the undersigned directors of the [*insert corporate name*] Company aforesaid, do hereby make and file this amended certificate for the purpose of correcting such informality or defect, pursuant to the provisions of the General Corporation Law, section 7, and for such purpose do certify and declare as follows:

[*Here set forth the amendment.*]

IN WITNESS WHEREOF, we have made and acknowledged this amended certificate in duplicate, and have hereunto set our hands this day of, 19..

[*Signature of directors.*]

STATE OF NEW YORK, }
County of } ss.:

On this day of, 19.., before me personally came [*insert names of the directors*], to me known and known to me to be the individuals described in and who executed the foregoing amended certificate, and they severally acknowledged to me that they executed the same.

.....
Notary Public,
.....County, N. Y.

(As to fees see note to preceding form.)

Form No. 18.

**Petition to Court to Amend Certificate of Incorporation which
Fails to State True Objects of Corporation.**

See the General Corporation Law, § 7.

SUPREME COURT, COUNTY.

IN THE MATTER OF THE PETITION OF THE	}
[insert corporate name] TO AMEND ITS CER- TIFICATE OF INCORPORATION.	

To the Supreme Court of the State of New York:

The petition of the [insert corporate name], the above-named petitioner, respectfully shows to this court that it is a corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of New York.

That annexed hereto and marked "Exhibit A" is a copy of the original certificate of incorporation of said corporation, which, as your petitioner is informed and verily believes, was duly filed and recorded in the office of the Secretary of State of the State of New York, on the day of, 19.., and a duplicate original [or a certified copy] thereof was also on the day of, 19.., duly filed and recorded in the office of the clerk of county.

That such certificate of incorporation, so filed as aforesaid, fails to express the true object and purpose of the corporation, so as to truly set forth such object and purpose. That it is and has been ever since the filing of said certificate of incorporation the intention and purpose of the incorporators to, and the true object and purpose of said corporation is, to [state same].

That annexed hereto and marked "Exhibit B," is a proposed amended certificate of incorporation duly signed and acknowledged by the directors of said corporation for the first year as named in the original certificate of incorporation. That said proposed amended certificate expresses the true object and purpose of said corporation as hereinbefore set forth, and the petitioner prays for an order of this court amending said original certificate so as to truly set forth such object and purpose, and permit your petitioner to file for record with said Secretary of State and County Clerk of county, said certificate so amended.

{ *Corporate* } The [*insert corporate name*] Company,
 Seal By [*signature*] President.

STATE OF NEW YORK, }
 County of, } ss.:

[*Name of president*], being duly sworn, says that he is the president of the [*insert corporate name*], the petitioner named in the foregoing petition; that the foregoing petition is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief; and that as to those matters he believes it to be true; that he affixed the corporate seal of said corporation to said petition and signed the same on behalf of said corporation by the authority of its board of directors.

Deponent further says that the reason this verification is not made by petitioner is that it is a domestic corporation; that deponent is the president thereof and makes the same from his personal knowledge and supervision of the affairs and business of said corporation.

[*Signature of president.*]

Sworn to before me, this }
 day of, 19... }

[*Signature of notary.*]

Form No. 19.

Notice of Application to Court for Correction of Objects.

See the General Corporation Law, § 7.

STATE OF NEW YORK, SUPREME COURT.

<p>IN THE MATTER OF THE PETITION OF THE [insert corporate name] TO AMEND ITS CER- TIFICATE OF INCORPORATION.</p>
--

Sir:—

Please take notice, that upon the petition, with a copy of which you are herewith served, a motion will be made at and next Special Term of this court, appointed to be held at the in the city [*or village*] of in and for the county of, on the day of, 19.., at the opening of the court on that day, or as soon thereafter as counsel can be heard, for a rule or order in this proceeding, amending the original certificate of incorporation of the [insert corporate name], filed and recorded in the office of the Secretary of State, and also in the office of the clerk of county, on or about the day of, 19.., so as to truly set forth the true object and purpose of said corporation as stated in said petition, and permitting the petitioner to file said amended certificate and to have the same recorded in the office of the Secretary of State, and also in the office of said clerk of county, in the manner required by law, or for such other or further order of relief in the premises as shall be just.

Dated, the day of, 19..

Yours, etc.,

.....

Attorney for the Petitioner.

Office address:

To Hon.

Attorney-General.

Form No. 20.**Form of Notice of Election of Directors.**

See the Stock Corporation Law, § 25.

Notice is hereby given that a meeting of the stockholders of [*insert name of company*] will be held at the office of the company [*state location of office*] on the day of, 19.., at o'clock, A. M. [*or P. M.*] for the purpose of electing [*insert number*] directors for the ensuing year, and [*insert number*] inspectors of election to serve at the next annual meeting, and for the transaction of such other business as may properly come before said meeting. Polls will remain open [*state length of time*]. Transfer books will be closed from, 19.., to, 19...

ALBANY, N. Y.,, 19...

.....
Secretary.

Form No. 21.**Stockholders Waiver of Notice of Annual Meeting.**

See the General Corporation Law, § 42.

I, the undersigned, a stockholder of the [*insert name*] Company, hereby admit due and timely service of a notice of which the foregoing is a true copy, and I hereby waive any further notice of the annual meeting of stockholders therein mentioned and the lapse of any prescribed period of time, and I do hereby authorize and approve all and any lawful business that may be deemed advisable by the stockholders present at such meeting.

[*Signature.*]

Form No. 22.

Certificate of Inspector of Election.

See the Stock Certificate Law, § 31.

We, the undersigned, duly elected inspectors of election of [*insert name of corporation*], a stock corporation, do hereby certify as follows:

That a meeting of the stockholders of said corporation was held at, on the day of, 19. ., at o'clock, . . . M., pursuant to due notice.

That before entering upon the discharge of our duties, we were severally sworn, and the oath so taken by us is hereto annexed.

That the result of the vote taken at such meeting for the election of directors of said corporation for the ensuing year was as follows:

A. B. . . . .	. . . . . Votes
C. D. . . . .	. . . . . Votes
E. F. . . . .	. . . . . Votes

That said A. B., C. D. and E. F. having received a plurality of the votes cast were declared by us duly elected directors of said corporation for the ensuing year.

That the result of the vote taken at such meeting for the election of inspectors of election of said corporation was as follows:

L. M. . . . .	. . . . . Votes
N. O. . . . .	. . . . . Votes
R. S. . . . .	. . . . . Votes

That said L. M., N. O. and R. S. having received a majority [*or plurality, as by-laws provide*] of all the votes cast for inspectors of election were declared by us duly elected as such.

IN WITNESS WHEREOF, we have made and signed this certificate this day of 19...

[Signatures of inspectors.]

STATE OF NEW YORK, }
County of, } ss.:

On this day of, 19.., before me personally came [*names of inspectors*], to me known and known to me to be the individuals described in and who executed the foregoing certificate and severally acknowledged to me that they executed the same.

[Signature of Notary.]

Form No. 23.

Oath of Inspectors to be Annexed to the Foregoing Certificate.

See the Stock Corporation Law, § 31.

STATE OF NEW YORK, }
County of, } ss.:

We, the undersigned inspectors of election, duly appointed to act at the meeting of the stockholders of the [*insert name of corporation*], to be held at on the day of, 19.., being severally duly sworn, do depose and say, and each for himself deposes and says, that he will faithfully execute the duties of inspector at such meeting with strict impartiality, and according to the best of his ability.

.....,
.....,

Severally sworn to before me, } *Inspectors.*
this of, 19.. }

.....

Notary, etc.

The foregoing certificate, with the oath annexed thereto, should be filed in the office of the clerk of the county in which the election was held.

Form No. 24.**Proxy from a Stockholder.**

See the General Corporation Law, § 26.

KNOW ALL MEN BY THESE PRESENTS, That I,, do hereby constitute and appoint C. D. to be my lawful attorney, substitute and proxy for me, and in my name to vote upon all the stock held by me in [*insert name of corporation*] at the annual meeting of stockholders of such corporation [*or at a special meeting of such corporation, as the case may be,*] to be held on the day of, 19.., and at any adjourned meeting thereof, as fully and with the same effect as I might or could do were I personally present at such meeting; and I hereby revoke any proxy or proxies heretofore given by me to any person or persons whatsoever.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this day of, 19...

[Signature.] [L. s.]

In presence of

All proxies must be filed in the office of the corporation.

Form No. 25.**Oath of Challenged Voter.**

See the General Corporation Law, § 27.

STATE OF NEW YORK, }
County of, } ss.:

I do solemnly swear that in voting at this election I have not, either directly, indirectly or impliedly, received any promise or any sum of money, or anything of value to in-

fluence the giving of my vote or votes at this meeting, or as a consideration therefor.

[Signature of Voter.]

Subscribed and sworn to before me, }
 this day of, 19... }

.....

Inspector of Election.

The oath taken as above must be filed in the office of the corporation.

Form No. 26.

Oath of Challenged Proxy.

See the General Corporation Law, § 27.

STATE OF NEW YORK, }
 County of, } ss.:

I do solemnly swear that I have not, either directly, indirectly or impliedly, given any promise or any sum of money or anything of value to induce the giving of a proxy to me to vote at this election, or received any promise or any sum of money or anything of value to influence the giving of my vote at this meeting, or as a consideration therefor.

[Signature of Proxy.]

Subscribed and sworn to before me, }
 this day of, 19... }

.....

Inspector of Election.

The oath taken as above must be filed in the office of the corporation.

Form No. 27.**Stock-Book of Stock Corporation.**

See the Stock Corporation Law, § 32.

**STOCK-BOOK OF THE [*insert corporate name*], PURSUANT TO
THE STOCK CORPORATION LAW OF THE STATE OF
NEW YORK.**

Names of stockholders.	Places of residence.	Number of shares of stock held.	Time each became owner of shares.	Amount paid thereon.

Section 32, above referred to, requires the names to be "alphabetically arranged," hence the pages of the stock-book should bear the letters of the alphabet in successive order, and each entry should be made upon the page bearing the appropriate letter, thus: "John Anderson" on page "A;" "John Brown" on page "B," etc.

Form No. 28.**Annual Report of Stock Corporations, Other than Monied or Railroad Corporations.**

See Stock Corporation Law, § 34.

**ANNUAL REPORT
OF
THE [*insert corporate name*] COMPANY.**

Pursuant to the provisions of section 34 of the Stock Corporation Law of the State of New York, I, the undersigned,, president [*or a vice-president, or the*

treasurer, or a secretary] of the [*insert name of corporation*], a domestic [*or a foreign*] stock corporation, do hereby make a report as of the first day of January, 19, as follows, to wit:

1. The amount of its capital stock is [*insert amount*] dollars, and the proportion actually issued is [*insert amount*] dollars.

2. The amount of its debts does not exceed the sum of [*insert amount*] dollars.

3. The amount of its assets is at least the sum of [*insert amount*] dollars.

4. The amount of its stock issued for property purchased is [*insert amount*] dollars.

5. The names and addresses of all the directors and officers of the company are as follows:

Directors: [*insert names and addresses.*]

Officers: President, [*insert name and address*].

Secretary, [*insert name and address*].

Treasurer, [*insert name and address*].

(*In case of a foreign corporation insert also the following:*)

*6. The name of the person designated in the manner prescribed by the Code of Civil Procedure, as a person upon whom process against the corporation may be served within the State is, whose address is

IN WITNESS WHEREOF, I have signed this report this day of, 19...

.,

President.

[*or a vice-president, or the treasurer, or a secretary, as the case may be.*]

The recitals contained in paragraphs 5 and 6 of this form constitute new matter required by the amendment of 1905.

Under the practice prevailing prior to the amendment of 1901, it was necessary to file the report during the month of January each

* The legislature overlooked the fact that the provisions for designations are now in section 16⁶ of the General Corporation Law.

year. It was also necessary to make such report in duplicate, one of which was to be filed in the office of the Secretary of State, and the other in the office of the clerk of the county in which the principal business office of the corporation was located. It was also required to be signed by a majority of the directors of the corporation and to be verified by the oath of the president or vice-president and treasurer or secretary.

Under the law as now modified the execution and filing of one report is sufficient, duplicate reports being unnecessary because the report is required, pursuant to the amended law, to be filed only in the office of the Secretary of State. It is to be signed by only one of the executive officers, either the president or a vice-president or the treasurer or a secretary. The report is not required to be sworn to, and need not be made or filed until an officer of the corporation has been requested in writing so to do by a creditor or by a stockholder of the corporation.

No fee is payable at the office of the Secretary of State for filing the report.

For statutes governing reports to the Comptroller by all corporations liable to direct State taxation, see Taxation.

Form No. 29.

Statement and Designation by a Foreign Stock Corporation Under the General Corporation Law, Section 16.

See the General Corporation Law, §§ 15 and 16.

Pursuant to the provisions of section 16 of the General Corporation Law of the State of New York, the [*insert corporate name*] Company, a stock corporation, organized and existing under and by virtue of the laws of the State of [*or Kingdom of, as the case may be*] does hereby make a statement and designation under its corporate seal, to be filed with the annexed sworn copy of its charter or certificate of incorporation, as follows, to wit:

First. That the business or objects of the said corporation which it is engaged in carrying on (or which it proposes to carry on), within the State of New York, is (or are) as follows: [*State business or objects.*]

Second. That the place within the State of New York which is to be its principal place of business is [*insert location*].

Third. That said corporation hereby designates [*insert name of person*] as a person upon whom a summons may be served within the State of New York, or any process or other paper, whereby a special proceeding is commenced in a court, or before an officer, except a proceeding to punish for contempt, and except where special provision for the service thereof is otherwise made by law.

Fourth. That said [*insert name of person*], so designated, has an office or place of business at No. street, in the city [*or village*] of,* the place where said corporation is to have its principal place of business within the State of New York. †

Fifth. That the written consent of said [*insert name*] to such designation, duly signed and acknowledged, is hereunto annexed.

Sixth. That a sworn copy of the charter [*or certificate of incorporation*] of said incorporation is hereunto annexed.

IN WITNESS WHEREOF, the [*insert corporate name*] Company, the corporation hereinbefore mentioned and described, has caused this instrument to be executed by its president [*or vice-president, or other acting head*], and has caused its corporate seal to be hereunto affixed this day of, 19...

THE [*insert corporate name*] COMPANY,

By [*signature*] President [*or vice-president, or title of other acting head of corporation*].

{ *Corporate Seal.* }

* If it is within the city, the street and street number, if any, or other suitable designation of the particular locality should be stated.

† The person so designated must have an office or place of business at the place where such corporation is to have its principal place of business within the State.

STATE OF
County of, } ss.:

On the day of in the year 19.., before me personally came, to me known, who, being duly sworn, did depose and say that he resides in; that he is the [*president or other officer*] of the [*name of corporation*], the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

[*Signature and office of officer taking acknowledgment.*]

Form No. 30.

Consent to be Attached to Foregoing Certificate.

I, [*insert name*], the person designated in the foregoing instrument as a person upon whom a summons or any process, as therein mentioned, against the [*insert name of corporation*] may be served within the State of New York, do hereby consent to such designation.

IN WITNESS WHEREOF, I have hereunto set my hand this day of, 19...

[*Signature.*]

STATE OF
County of, } ss.:

On this day of, 19.., before me personally came, to me known and known to me to be the person described in and who signed the foregoing consent, and he acknowledged to me that he signed and executed the same.

.....Notary Public,
..... County, N. Y.

Form No. 31.

Sworn Copy of Charter or Certificate of Incorporation to be Attached to Foregoing Certificate.

[Here append copy of the charter or certificate of incorporation.]

Oath to be Annexed to Copy of Charter or Certificate of Incorporation.

STATE OF
County of } ss.:

[Insert name], being duly sworn, deposes and says, that he is the secretary *[or other officer]* of *[insert name of corporation]* Company, a corporation organized under the laws of the State of ; that he has compared the foregoing copy with the charter (or certificate of incorporation) of said corporation, and that the same is a true copy of such charter (or certificate of incorporation), and of the whole thereof.

[Signature.]

Sworn to before me, this }
day of , 19. . . }

[Signature of Notary.]

The foregoing papers should be attached so as to constitute one complete instrument, and filed with the Secretary of State, who will thereupon issue the certificate of authority.

The fees at the office of the Secretary of State are eleven dollars. (Executive Law, L. 1909, ch. 23, § 26.) See pages 39, 40, ante.

A certified copy of the certificate of incorporation will not suffice. The act requires a sworn copy.

In case an acknowledgment or affidavit is taken before a notary public or justice of the peace in another State, the act of such person should be authenticated by the certificate of the county clerk. No certificate of a county clerk is necessary when such acknowledgment or affidavit is taken in another State by a commission of deeds acting under appointment from the Governor of the State of New York.

Form No. 32.

Resolution of Board of Directors of a Foreign Corporation.

Resolved, That the president [*or vice-president, or as the case may be*], of the [*insert corporate name*] be and is hereby authorized and directed to execute in the name and on behalf of said corporation the statement required to be filed by foreign corporations under the provisions of the General Corporation Law of the State of New York, to attach the seal of the corporation thereto, and in said statement to designate [*insert name of person*], as the person upon whom process against the corporation may be served within the State of New York, and further to do all acts and things necessary to comply with the provisions of law in said State.

Form No. 33.

Revocation and New Designation by a Foreign Corporation.

Pursuant to the provisions of section 16 of General Corporation Law of the State of New York, the [*insert corporate name*] Company, a stock corporation organized and existing under and by virtue of the laws of the State of, does hereby certify as follows:

That said corporation hereby revokes the designation by it heretofore made of [*insert name of person*], as the person upon whom process against the said corporation may be served within the State of New York.

That in the place and stead of said designation, hereby revoked, the said [*insert corporate name*] Company hereby

designates [*insert name of persons*] as the person upon whom a summons against said corporation may be served within the State of New York, or any process or other paper, whereby a special proceeding is commenced in a court, or before an officer, except a proceeding to punish for contempt, and except where special provision for the service thereof is otherwise made by law.

That the said [*insert name*], hereby designated, has an office or place of business at No. street, in the city [*or village*] of, the place where said corporation is to have its principal place of business within the State of New York.

That the written consent of said [*insert name*] to such designation, duly signed and acknowledged, is hereto annexed.

IN WITNESS WHEREOF, the [*insert corporate name*] Company, the corporation hereinbefore mentioned and described, has caused this instrument to be executed by its president [*or vice-president, or other acting head*], and has caused its corporate seal to be hereunto affixed this day of, 19...

THE [*insert corporate name*] COMPANY,

{ <i>Corporate</i> <i>Seal.</i> }	By [<i>signature</i>] <i>President</i> [<i>or vice-president or title of other acting head of corporation.</i>]
--	---

[*Attach proof of execution, consent of person designated and acknowledgment as in Forms Nos. 29 and 30.*]

This certificate, when properly executed, is to be filed in the office of the Secretary of State. No fee is payable.

Form No. 34.**Certificate of Removal of Office of Designee.**

See General Corporation Law, § 16.

THIS IS TO CERTIFY, That I,, the person designated by the Company, a stock corporation organized and existing under the laws of the State of, by a certain certificate filed in the office of the Secretary of the State of New York on, 19.., as the person upon whom process against said corporation may be served within the State of New York, have removed my office and place of business within the State of New York from No. street in the city [*or village*] of, to No. street, in said city, [*or village*] and that from and after the day of, 19.., my office and place of business will be at said No. street in the city [*or village*] of

IN WITNESS WHEREOF, I have hereto set my hand at, this day of, 19..

[*Signature.*]

STATE OF NEW YORK, }
County of, } ss.:

On this of, 19.., before me personally appeared, to me known and known to me to be the person described in and who executed the foregoing certificate and acknowledged to me that he executed the same.

[*Signature of Notary Public.*]

The foregoing is to be filed in the office of the Secretary of State. No fee is payable.

Form No. 35.

* Affidavit for State Comptroller.

IN THE MATTER OF THE APPLICATION OF THE [*insert name*]
 COMPANY, A FOREIGN STOCK CORPORATION, FOR A CER-
 TIFICATE OF AUTHORITY UNDER THE PROVISIONS OF
 SECTIONS 15 AND 16 OF THE GENERAL CORPORATION LAW
 OF THE STATE OF NEW YORK.

STATE OF NEW YORK, }
 County of, } ss.:

[*Insert name*], being duly sworn, deposes and says that he is the secretary of the [*insert name*] Company; that said company is a stock corporation and was incorporated under the laws of the State of on or about, 19..; that said company opened an office at No. street, borough of Manhattan, city of New York, on or about, 19..; that prior to said last-mentioned date said company had no office or place of business in the State of New York and was not engaged in the transaction of business therein; that as said company has not been engaged in business within the State of New York or in the exercise of its corporate franchises therein for the period of one year it is unable at the present time to make a report under the provisions of section 181 of the Tax Law for the purpose of the computation of the license fee prescribed by said section.

Sworn to before me, this }
 day of, 19... }

.....

Notary Public,
New York County.

* If the corporation has been doing business in the state for only a fractional part of a year it should file an affidavit similar to the above.

Form No. 36.

Certificate of Extension of Corporate Existence.

See the General Corporation Law, § 37.

We, the undersigned [*insert name*], president [*or a vice-president*] and [*insert name*] secretary [*or an assistant secretary*] of the [*name of corporation*], a domestic stock corporation, do hereby certify, under the seal of said corporation, as follows, to wit:

That the consent of the stockholders of said corporation owning at least two-thirds in amount of its capital stock has been given in writing [*or by vote at a special meeting of the stockholders called for that purpose, upon the same notice as that required for the annual meeting of the corporation*] to extend the existence of said corporation for a term of years beyond the time specified in its original certificate of incorporation [*or for a further term of years beyond the time specified in a certificate of extension of corporate existence heretofore filed.*]

That such written consent [*or that a copy of such written consent, if desired*] of said stockholders is hereto annexed.

[*Or, in case of a vote, that a copy of the resolution adopted at said meeting of stockholders is hereto annexed. See form No. 38.*]

IN WITNESS WHEREOF, this certificate under the seal of said corporation has been subscribed by us, this day of, 19...

{ *Corporate* }, President [*or a vice-president*].
{ *Seal* }, Secretary [*or an assistant secretary*].

STATE OF NEW YORK, }
County of, } ss.:

On this day of, 19..., before me personally came and, to me known and

known to me to be the individuals described in and who executed the foregoing certificate, and they severally acknowledged to me that they executed the same.

.....,
Notary Public,
County, N. Y.

The fee at the office of the Secretary of State upon above certificate is fifteen cents for each folio of 100 words contained therein. At the county clerk's office the fee is six cents for filing and ten cents per folio for recording.

Form No. 37.

Form of Consent in Writing.

See Form No. 36.

We, the undersigned, being stockholders of the [*insert corporate name*], a domestic stock corporation, and each owning the number of shares of stock in such corporation set opposite our respective signatures hereto, and together owning at least two-thirds of the capital stock of such corporation, to wit, shares of the total of shares into which such capital stock is divided, do hereby certify, pursuant to the General Corporation Law of the State of New York, that we severally consent that the corporate existence of such corporation be extended for the term of years beyond the time specified in its original certificate of incorporation [*or for a further term of years beyond the time specified in a certificate of extension of corporate existence heretofore filed*].

IN WITNESS WHEREOF, we have hereunto set our hands to this consent in duplicate, and the number of shares of stock owned by us, respectively, in such company, this day of, 19...

[*Signatures of Stockholders.*]

Form No. 38.**Resolution for Extension of Existence.**

See Form No. 36.

Resolved, That we do hereby consent that the corporate existence of the Company be extended for the term of years beyond the time specified in its original certificate of incorporation [*or for a further term of years beyond the time specified in a certificate of extension of corporate existence heretofore filed*].

Form No. 39.**Certificate to Increase (or Reduce) Number of Directors.**

See Stock Corporation Law, § 26.

CERTIFICATE TO INCREASE (OR REDUCE) THE NUMBER OF
DIRECTORS OF [*insert corporate name*] COMPANY.

We, the undersigned, do hereby certify that the following is a correct transcript of the minutes of proceedings of a meeting of stockholders of the [*insert name of corporation*], held pursuant to "the Stock Corporation Law," article 2, section 21, to wit:

....., N. Y.,, 19...

A special meeting of the stockholders of [*insert name of corporation*], a stock corporation, was held this day at o'clock A. M., [*or P. M.*], to determine whether the number of directors shall be increased [*or reduced*].

Such meeting was held at the office of the company on two weeks' notice in writing to each stockholder of record; such notice having been served personally, or by mail, postage prepaid, directed to each stockholder at his last known post-office address.

Pursuant to such notice the meeting was held at the time and place mentioned, stockholders owning more than a majority of the stock of the corporation being present in person or by proxy.

Such meeting was duly organized by choosing C. D. as president and A. B. as secretary thereof.

The notice of the meeting and proof of the due service thereof were read and filed in the office of the corporation at the time of such meeting.

On motion of E. F., duly seconded, the following resolution was offered for adoption:

"Resolved, That the number of directors of [insert name of company] be increased [or reduced] from, the present number, to"

Upon a canvass of the votes cast upon said resolution, it was found that stockholders owning shares of the stock of the corporation, being more than a majority of the stock thereof, voted in favor of said resolution, and stockholders owning shares of stock of the corporation, voted against its adoption.

[Or, No stockholder voted against its adoption, as the case may be.]

Such resolution was thereupon declared duly adopted, and the meeting adjourned.

IN WITNESS WHEREOF, we have made, signed and verified this certificate in duplicate, this day of, 19...

C. D., *President.*

A. B., *Secretary.*

STATE OF NEW YORK, }
County of, } ss.:

C. D. and A. B., being severally duly sworn, depose and say, and each for himself deposes and says, that he, the said C. D., was the president, and that he, the said A. B., was the secretary, of the meeting of stockholders of [insert

name of corporation], held to determine whether the number of directors thereof shall be increased [*or reduced*]; and that the foregoing is a correct transcript of the proceedings of such meeting entered in the minutes of the corporation.

C. D., *President.*

A. B., *Secretary.*

Sworn to before me, this }
 day of, 19...

G. H.,

Notary Public,

County, N. Y.

The fees upon filing and recording the above certificate are as follows: Office of Secretary of State—recording, fifteen cents per folio; county clerk—filing, six cents; recording, ten cents per folio.

Form No. 40.

Notice to Stockholders of Meeting to Change Number of Directors.

See the Stock Corporation Law, § 26.

To the Stockholders of the [*insert corporate name*]:

Notice is hereby given that a special meeting of the stockholders of [*insert name of corporation*] will be held at the office of the company at No. street, in the city [*or village*] of, on the day of, 19.., at o'clock in thenoon of that day, to determine whether the number of its directors shall be increased [*or reduced*].

Dated, Albany, N. Y.,, 19...

A. B.,

Secretary of [*insert name of corporation*].

Form No. 41.

Proof of Service of Notice.

See the Stock Corporation Law, § 26.

STATE OF NEW YORK, }
 County of, } ss.:

A. B., who is upwards of eighteen years of age, being duly sworn, deposes and says, that on the day of, 19.., he served a notice in writing of which a true copy is hereto annexed, upon the following persons, stockholders of record of [*insert corporate name*], namely: [*Name persons served*] by delivering to and leaving with each of them personally a copy of said notice. That on the day of, 19.., he served the said notice upon the following persons, stockholders of record of said corporation, namely: [*Name persons served*] by mailing to each of them a copy of said notice at the post-office in the city [*or village*] of, inclosed in a sealed envelope and directed to each stockholder at his last known post-office address, and prepaying the proper postage on each of said envelopes so mailed.

A. B.

Sworn to before me, this }
 day of, 19... }

[*Signature of notary.*]

Form No. 42.**Increase (or Reduction) of Number of Directors by Unanimous Consent.**

Under the Stock Corporation Law, § 26.

CERTIFICATE OF INCREASE (OR REDUCTION) OF THE NUMBER OF DIRECTORS OF THE COMPANY.**UNANIMOUS CONSENT OF STOCKHOLDERS.**

We, the undersigned, being all the stockholders and the holders of record of the entire capital stock, issued and outstanding, of the [*insert corporate name*], company, a corporation duly organized and existing under the laws of the State of New York, do hereby pursuant to the provisions of the Stock Corporation Law, section 26, agree and consent that the number of directors of said corporation shall be increased (or reduced) from to

IN WITNESS WHEREOF, we, the above mentioned stockholders and holders of record of the entire issued and outstanding capital stock of said company have made, signed and executed this instrument in duplicate.

Dated this day of, 19...

[*Signatures.*]

[*Add acknowledgment of stockholders; add also affidavit of custodian of stock book as in Form No. 47.*]

Form No. 43.**Certificate of Increase (or Reduction) of Capital Stock.**

See Stock Corporation Law, §§ 62, 63, 64.

We, the undersigned, A. B., chairman, and C. D., secretary, respectively, of a special meeting of the stockholders of [*insert corporate name*], a domestic stock corporation,

held for the purpose of increasing [*or reducing*] its capital stock, do hereby certify:

That prior to such meeting a notice, stating the time, place and object thereof, and the amount of the increase [*or reduction*] proposed, signed by the president [*or a vice-president*] and the secretary, was published once a week, for at least two successive weeks, in [*insert name of paper*], a newspaper in the county where the principal business office of such corporation is located.

That the following is a true copy of such notice:

[*Insert here copy of notice as given in Form No. 44.*]

That a copy of such notice was also duly mailed, postage prepaid, to each stockholder of such corporation, at his last known post-office address, at least two weeks before the meeting.

[*Or, that a copy of such notice was personally served at least five days before said meeting upon the following named stockholders:*]

That at the time and place specified in such notice, stockholders appeared in person or by proxy, in numbers representing at least a majority of all the shares of stock of such corporation, and organized said meeting by choosing from their number the undersigned, A. B., as chairman, and C. D., as secretary thereof.

That the notice of the meeting and proof of the proper publishing and mailing [*or service*] thereof were presented.

That, upon motion, a vote was then taken of those present in person or by proxy upon the following resolution:

Resolved, That the capital stock of [*insert name of company*], be increased [*or reduced*] from the present amount thereof, to wit: [*insert amount*] dollars, consisting of [*insert number*] shares of the par value of [*insert par value*] dollars each, to [*insert amount to which stock is increased or reduced*] dollars, to consist of [*insert number*] shares of the par value of [*insert par value*] dollars each.

Resolved, further, That the chairman and secretary of this meeting be, and they are hereby authorized and directed to make, sign, verify and acknowledge the certificates of proceedings required by statute and cause one of such certificates to be filed and recorded in the office of the clerk of county, and a duplicate thereof in the office of the Secretary of State, and to do all acts and things that may be necessary to comply with the provisions of law applicable to and regulating such increase [*or reduction*] of capital stock.

That stockholders owning [*insert number*] shares of stock, being at least a majority of all the stock of the corporation, voted in favor of such resolution; and stockholders owning [*insert number*] shares of stock voted against its adoption. [*Or, "and no stockholder voted against its adoption," if such be the case.*]

That a sufficient number of votes having been cast in favor of such increase [*or reduction*], such resolution was declared duly adopted.

That the amount of capital of said corporation heretofore authorized is [*insert amount*] dollars and the proportion thereof actually issued is [*insert amount*] dollars; and that the amount of the increased [*or reduced*] capital stock is [*insert amount*] dollars.

**[That the whole amount of the ascertained debts and liabilities of the corporation is \$.]*

IN WITNESS WHEREOF, we have made, signed, verified and acknowledged this certificate in duplicate.

Dated this day of, 19...

A. B. *Chairman.*

C. D., *Secretary.*

* This paragraph is to be inserted only in cases of reduction of capital stock.

STATE OF NEW YORK, }
 County of, } ss.:

A. B., chairman, and C. D., secretary, respectively, of the aforesaid meeting, being severally duly sworn, do depose and say, and each for himself deposes and says, that he has read the foregoing certificate subscribed by him, and knows its contents, and that the same is true.

A. B., *Chairman.*

C. D., *Secretary.*

Sworn to before me, this }
 day of, 19.. }

E. F.,

Notary Public,

.....County, N. Y.

STATE OF NEW YORK, }
 County of, } ss.:

On this day of, 19.., before me personally came A. B. and C. D., to me personally known to be the persons described in and who made, signed and verified the foregoing certificate and severally duly acknowledged to me that they made, signed and verified the same for the uses and purposes therein set forth.

E. F.,

Notary Public,

.....County, N. Y.

At the office of the Secretary of State the fee upon the foregoing certificate is fifteen cents for each folio of 100 words contained therein. At the county clerk's office the fees are: Filing, six cents; recording, ten cents per folio. In addition to such fees, in case of an increase of capital stock, there must be forwarded to the State Treasurer (not to the Secretary of State) one-twentieth of one per cent. upon the amount of such increase, simultaneously with the transmission of the certificate to the Secretary of State.

Certificates of reduction of capital stock of corporations other than railroads, must have indorsed thereon the approval of the State Comptroller, and such certificates should be sent to the Comptroller's office for approval prior to their presentation for filing in the office of the Secretary of State, or of any county clerk. Proper informa-

tion in the form of an affidavit must be furnished the Comptroller to enable him to indorse upon the certificate the statutory approval. For such purpose a form of affidavit, designed to contain the essential proof and to meet the requirements of the Comptroller's office, has been prepared. See form No. 45.

Form No. 44.

Notice of Meeting to Increase or Reduce Capital Stock.

See Stock Corporation Law, § 63.

NOTICE TO STOCKHOLDERS.

....., N. Y.,, 19...

A special meeting of the stockholders of [*insert name of company*] will be held on the day of, 19.., at o'clock, P. M. [*or A. M.*] at the office of such company, at No. street, in the city [*or village*] of, for the purpose of voting upon a proposition to increase [*or reduce*] its capital stock from [*insert amount of present capital stock*], consisting of [*insert number of shares*] shares of the par value of [*insert par value*] dollars each, to [*insert amount to which stock is proposed to be increased or reduced*] dollars, to consist of [*insert number of shares*] shares of the par value of [*insert par value*] dollars each.

.....,
Secretary.

Form No. 45.

Proof for the State Comptroller's Information Upon an Application for Approval of a Reduction of Capital Stock.

See Stock Corporation Law, § 64.

STATE OF NEW YORK, }
 County of, } ss.:

A. B. and C. D., treasurer and secretary, respectively, of [insert name of company], being severally duly sworn, do depose and say, and each for himself deposes and says: That the said A. B. is the treasurer of [insert name of company], and the said C. D. is the secretary thereof; that such company is a domestic stock corporation other than a railroad corporation, or a moneyed corporation; that a capital of [insert amount to which the capital stock is reduced] dollars is sufficient for the proper purposes of the corporation, and is in excess of its debts and liabilities.

A. B., *Treasurer*
 C. D., *Secretary*.

Sworn to before me, this }
 day of, 19... }

E. F.,
Notary Public,
 County, N. Y.

The foregoing affidavit should not be attached to the other papers, as it is to be retained by the Comptroller for filing in his office.

The fee for each certificate of approval furnished by the Comptroller is one dollar, as provided in the Executive Law (L. 1909, ch. 23), § 42.

No form of certificate of approval is appended here, as a printed blank prepared by the Comptroller is used by that official.

Form No. 46.**Stockholder's Waiver of Notice of a Meeting.**

See General Corporation Law, § 42.

I, the undersigned, a stockholder of the Company, hereby admit due and timely service of a notice of which the foregoing is a true copy, and I hereby waive any further notice of the meeting therein mentioned and the lapse of any prescribed period of time, and I do hereby authorize and approve the proposed increase of capital stock of said company from \$. to \$. [*or, as the case may be*].

.....

Form No. 47.**Unanimous Consent of Stockholders to Increase or Reduce Capital Stock.**

Under Stock Corporation Law, § 63.

We, the undersigned, being stockholders of the [*insert corporate name*] Company, a stock corporation organized and existing under the laws of the State of New York, do hereby consent that the present authorized capital stock of said corporation, to wit: [*Insert amount*] dollars, consisting of shares of the par value of one hundred dollars each, be increased [*or reduced*] to [*insert amount*] dollars, to consist of shares of the par value of dollars each, and we do hereby authorize such increase [*or reduction*] of capital stock; and empower the officers of the corporation to do all acts and things necessary to effectuate such increase [*or reduction*] of capital stock.

And we do hereby certify as follows:

That the amount of capital of said corporation heretofore authorized is [*insert amount*] dollars;

That the proportion thereof actually issued is [*insert amount*] dollars;

That the amount of the increased [*or reduced*] capital stock is [*insert amount*] dollars;

* That the whole amount of the ascertained debts and liabilities of the corporation is \$.....

IN WITNESS WHEREOF, we have signed this instrument in duplicate.

Dated, this day of, 19...

[*Signatures of Stockholders.*]

STATE OF NEW YORK, }
County of, } ss.:

On this day of, 19.., before me personally came, to me known and known to me to be the individuals described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same.

.....,
Notary Public.

Affidavit of Custodian of Stock Book.

STATE OF NEW YORK, }
County of, } ss.:

[*Insert name*], being duly sworn, deposes and says: That he is the secretary [*or treasurer*] of the [*insert corporate name*] Company, the corporation mentioned in the foregoing instrument; that he is the custodian of the stock book, containing the names of the stockholders of said corporation; that [*insert names of stockholders*], the persons who have signed the foregoing instrument, are all the stockholders of said corporation, and that they are the holders of

* This paragraph is to be inserted only in cases of reduction of capital stock.

record of the entire capital stock of said corporation issued and outstanding.

[Signature.]

Sworn to before me, this }
 day of, 19.. }

.....,
Notary Public.

Form No. 48.

Certificate of Change in Par Value of Shares.

See the Stock Corporation Law, § 65.

We, the undersigned, chairman and secretary, respectively, of a special meeting of the stockholders of [*insert corporate name*], a domestic stock corporation, held for the purpose of increasing [*or reducing*] the number of shares into which its capital stock is divided, without increasing [*or reducing*] the amount of capital stock of such corporation, do hereby certify:

That prior to such meeting a notice stating the time, place and object thereof, and the increase [*or reduction*] of the number of shares proposed, signed by a majority of the directors, was published once a week, for at least two successive weeks, in [*insert name of paper*], a newspaper in the county where the principal business office of such corporation is located.

That the following is a true copy of such notice:

Notice to stockholders: A special meeting of the stockholders of the [*insert corporate name*] Company, will be held at the office of the company at No. street, in the city [*or village*] of, on the day of, 19.., at o'clock, .. M., for the purpose of considering and voting upon a proposition to in-

crease [*or reduce*] the number of shares into which the capital stock shall be divided, without increasing [*or reducing*] the amount of such capital stock, so that hereafter such capital stock shall be divided into shares of the par value of dollars each.

Dated, Albany, N. Y.,, 19...

A. B.,

C. D.,

Majority of Directors.

That a copy of such notice was also personally served upon or duly mailed, postage prepaid, to each stockholder of such corporation at his last known post-office address, at least three weeks before the meeting.

That at the time and place specified in such notice, stockholders appeared in person or by proxy, in number representing at least two-thirds of all the shares of stock of the corporation, and organized by choosing from their number the undersigned A. B., as chairman, and C. D., as secretary thereof.

That the notice of the meeting and proof of the proper publishing and mailing thereof were presented.

That, upon motion, a vote was then taken of those present in person or by proxy upon the following resolution:

Resolved, That the number of shares into which the capital stock of the [*insert corporate name*] Company is divided be increased [*or reduced*] from the present number, to wit: shares of the value of dollars each, to the following number, to wit: shares of the par value of dollars each.

That stockholders owning [*insert number*] shares of stock, being at least two-thirds of all the stock of the corporation, voted in favor of such resolution; and stockholders owning [*insert number*] shares of stock voted

against its adoption. [*Or, "and no stockholder voted against its adoption," as the case may be.*]

That a sufficient number of votes having been cast in favor of such resolution, the same was declared duly adopted, and the meeting adjourned.

IN WITNESS WHEREOF, we have made, signed, verified and acknowledged this certificate in duplicate.

Dated, this day of, 19...

A. B. *Chairman.*

C. D., *Secretary.*

STATE OF NEW YORK, }
County of, } ss.:

A. B., chairman, and C. D., secretary, respectively, of the aforesaid meeting, being severally duly sworn, do depose and say, each for himself, that he has read the foregoing certificate subscribed by him, and knows its contents, and that the same is true.

[*Signatures of officers.*]

Sworn to before me, this }
day of, 19... }
[*Signature of Notary.*]

STATE OF NEW YORK, }
County of, } ss.:

On this day of, 19.., before me personally came A. B. and C. D. to me known and known to me to be the persons described in and who made, signed and verified the foregoing certificate and severally duly acknowledged to me that they made, signed and verified the same.

[*Signature of Notary.*]

Form No. 49.

Dissolution by Incorporators.

See the General Corporation Law, § 220.

We, the undersigned, being all the incorporators named in the certificate of incorporation of the [*insert name*] Company, filed for the purpose of creating a domestic stock corporation, other than a moneyed or transportation corporation, do hereby, pursuant to the General Corporation Law, § 220, certify as follows:

First. That the names of the incorporators of the said [*insert name*] Company are as follows:

[*Insert the names of the incorporators.*]

Second. That no part of the capital of said company has been paid.

Third. That said company has no liabilities.

Fourth. That the business for which said company was created has not been begun.

Fifth. That we, the aforesaid incorporators, do hereby surrender to the State of New York, all the rights and franchises obtained for and in behalf of said corporation.

IN WITNESS WHEREOF, we have signed this certificate in duplicate.

Dated,, 19...

[*Signatures of the incorporators.*]

STATE OF NEW YORK, }
County of, } ss.:

[*Insert names of incorporators*], being severally duly sworn, each for himself, deposes and says, that he is one of the incorporators named in the foregoing certificate; that

he has read the foregoing certificate subscribed by him and knows the contents thereof, and that the same is true.

[*Signatures of the incorporators.*]

Sworn to before me, this }
day of, 19. . . }

.,

Notary Public,

. *County,*

New York.

STATE OF NEW YORK, }
County of, } *ss.:*

On this day of, 19. . ., before me personally came [*insert names of incorporators*], to me known and known to me to be the persons described in and who made, signed and verified the foregoing certificate and they severally duly acknowledged to me that they had made, signed and verified the same.

.

Notary Public,

. *County,*

New York.

Form No. 50.

Proof of Execution of an Instrument by a Corporation.

See the Real Property Law (L. 1909, ch. 52), § 309.

STATE OF NEW YORK, }
County of, } *ss.:*

On the day of in the year, before me personally came, to me known, who, being by me duly sworn, did depose and say that he resides in; that he is the [*president or other officer*] of the [*name of corporation*], the corporation de-

scribed in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation; and that he signed his name thereto by like order.

[Signature and office of officer taking acknowledgment.]

If such corporation have no seal, that fact must be stated in place of the statements required respecting the seal. (L. 1909, ch. 52, § 309.)

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